IN THE

Supreme Court of the United States

Supreme Court, U. S.
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OCTOBER TERM, 1975

NO. 75-1463

HERBERT W. CABBLER

Petitioner

v.

SUPERINTENDENT, VIRGINIA
STATE PENITENTIARY.

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SAMUEL W. TUCKER
HILL, TUCKER & MARSH
214 EAST CLAY STREET
RICHMOND, VIRGINIA 23220

GERALD G. POINDEXTER
POINDEXTER & POINDEXTER
304 WEST CARY STREET
RICHMOND, VIRGINIA 23220

Counsels for Petitioner

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The petitioner, Herbert W. Cabbler, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on December 8, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. (Infra pp. 2a-10a). The opinion of the District Court for the Eastern District of Virginia appears at 374 F. Supp. 690 (E.D. Va. 1974), and is likewise appended. (Infra, pp. 11a-30a). The opinion of the Virginia Supreme Court is also appended hereto. (Infra. pp. 31a-36a).

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered in December 8, 1975. A rehearing was denied on January 13. 1976. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. S 1254(1).

QUESTION PRESENTED

I. Whether the warrantless seizure of evidence from petitioner's vehicle during the inventory search violated petitioner's fourth amendment rights?

STATEMENT OF THE CASE

The record reveals that the petitioner, Herbert W. Cabbler, a prisoner of the Commonwealth of Virginia, sought habeas corpus relief under 28 U.S.C. S 2254 from his several convictions of grand larceny and petit larceny in the state courts, alleging that certain items were admitted into evidence in his criminal trial which had been seized from his automobile by Roanoke, Virginia police in violation of his fourth amendment rights. Based on the record in the State proceedings, the United States District Court found for the petitioner. 374 F. Suppl. 690 (E. D. Va. 1974) and ordered his release. Upon an appeal by the Commonwealth, the Court of Appeals for the Fourth Circuit reversed. (Infra, pp. 2a-10a).

The circuit court rendered a detailed finding of fact and, because of the specific nature of petitioner's claim simply footnoted the conflicting testimonial evidence as to what transpired attendant to the search of Cabbler's vehicle, the seizure of its contents and his indictment on the theft charges which form the basis of this petition. (Infra. pp. 3a-4a). For the purposes of this petition, a similarly abbreviated rendition of the facts taken from the trial transcript, with references thereto, is tendered.

In the early morning hours of September 2, 1969, it was reported to a Sergeant Reynolds of the Roanoke, Virginia police department that petitioner and two others had fired a rifle into

a city restaurant. The alleged witnesses to the shooting were instructed to obtain felony warrants and Reynolds broadcasted a lookout for Cabbler. Shortly after the alert two other police officers spotted Cabbler and a passenger driving throught the city. They followed his vehicle to a local hospital where they observed Cabbler park on hospital property in the emergency parking zone, get out and enter the hospital emergency room; (T-38) it was later learned by the police that Cabbler was seeking treatment for himself and for his passenger, both of whom were suffering recently inflicted gunshot wounds. Reynolds, who had instructed the two officers to follow Cabbler, arrived, looked into the empty vehicle and observed a pistol on the rear seat and some shell boxes in plain view on the floorboards of the vehicle. Reynolds stationed one of the other officers outside and he entered the hospital emergency room where he found Cabbler who he arrested and charged with shooting into an occupied building, handcuffed and removed from the hospital. (T-40,41) Cabbler was escorted outside and placed in a police car. It was raining and Cabbler asked the arresting officer, who had his keys, to roll up the windows to his auto (T-42,151,153). The pistol and shell boxes were removed by the officers and shown to Cabbler, who denied any knowledge of them. One officer remained with the auto while Cabbler was transported by Reynolds to the police station. (T-48) Reynolds then returned to the hospital and Cabbler's auto was driven by him to the police station for inventoring and storage in the city garage under what was described as long standing police department policy, despite petitioner's earlier representations to the officers that he himself had already made arrangements to have it picked up. (T 156,165) Although the police did not suspect further criminal activity involving Cabbler or his auto and no probable cause existed to search the vehicle, at the police headquarters, without Cabbler's consent, the car was thoroughly searched and its contents were removed and inventoried before being placed in the police property room. (T 69, 199, 206). No warrant was obtained for the search of the auto or for the removal of items found therein. A detailed list of all items found in the car which were being held for safekeeping was drawn up and turned over to the detective bureau and the property itself later stored in the police property room (T-52, 73 210). Cabbler was subsequently indicted on several larceny counts after it was discovered that some of the items found in the vehicle had been stolen.

Prior to trial in the state court, petitioner moved to suppress the evidence seized as a result of the search of the trunk of his car, contending that the seizure of his car was improper, and that the search of the car was illegal both in its inception and in its scope. The motion was denied, and defendant was convicted. On appeal to the Virginia Supreme Court, the conviction was affirmed, and the seizure of the car and the search of the trunk were approved. *Cabbler v. Commonwealth,* 212 Va. 520, 184 S.E. 2d 781 (1971). Petitioner then sought a writ of certiorari to the United States Supreme Court which was denied. 405 U.S. 1073 (1972).

Pursuant to 28 U.S.C. S 2254, petitioner next sought habeas corpus relief. The district court, in a thorough and searching analysis of the law of search and seizure, found for the petitioner. *Cabbler v. Superintendent, Virginia State Penitentiary,* 374 F. Supp. 690 (E.D. Va. 1974). The holding of that opinion, simply stated, was that the inventory search procedure could not be justified by any of the rationales advocated by the state, thus making it unreasonable.

The Court of Appeals for the Fourth Circuit held that "an inventory taken of a lawfully impounded vehicle to protect the property from pilferage or the officers from false claims of loss is reasonable, and hence not in violation of the Fourth Amendment." (Infra, p. 9a).

It is this holding that is at issue in this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT
SUMMARY OF ARGUMENT

The question of whether police may conduct a warrantless inventory search of the trunk of a lawfully impounded vehicle, and use as evidence in a later criminal prosecution any contraband discovered as a result of such inventory search, has not been resolved by this Court. The Circuit Courts of Appeals are in direct conflict on the question, and conflicting opinions have been rendered by numerous state courts. This conflict among the circuits and the states fosters confusion and uncertainty as to the propriety

of the inventory search procedure, and undermines citizen respect for the law and for law enforcement personnel by virtue of the inconsistent interpretation and application of the fourth amendment in the inventory search context.

In addition to the need for uniform court interpretation of the inventory search question, the need for guidelines in this area encompass local, state, and federal law enforcement officers who, at present, cannot accurately ascertain the proper parameters of the fourth amendment. The possibility of damage suits for violations of the fourth amendment produces a chilling effect on law enforcement officials, and makes it extremely difficult to define the boundaries of the evidence gathering process.

For the above reasons, it is respectfully submitted that it is imperative that this question be resolved at this time, and that this case, wherein the inventory search of a locked trunk resulted in the seizure of contraband unrelated to the crime for which petitioner was arrested, is particularly well suited as the means for such resolution.

THE INVENTORY PROCEDURE IS A SEARCH SUBJECT TO THE FOURTH AMENDMENT REQUIREMENT OF REASONABLENESS.

The Supreme Court of the United States has not specifically decided whether an inventory procedure is a search. In *Cady v. Dombrowski,* 413 U.S. 433 (1973), Mr. Justice Rehnquist noted the state's argument that an inventory is not a search because it is not conducted to uncover evidence of a crime and stated, "We need not decide this issue." 413 U.S. at 442.

A number of lower courts have, however, decided this issue. Several state courts have concluded that the inventory procedure is not a search. *See, e.g., People v. Sullivan,* 29 N.Y. 2d 69, 323 N.Y.S.2d 945 (1971); *State v. Walker,* 185 Neb. 44, 173 N.W.2d 372, *cert. denied,* 399 U.S. 912 (1970). This line of cases relies largely upon a draft of the Model Code of Pre-Arraignment Procedure of the American Law Institute, where "search" is defined

as an intrusion under color of authority for the purpose of seizing things. Noting that the inventory examination is not motivated by an intention to seize evidence, courts have concluded that this is not a search. *See Sullivan, supra.*

Numerous courts have, on the other hand, concluded in well reasoned opinions that the inventory procedure is a fourth amendment search. In *Mozetti v. Superior Court of California,* 4 Cal. 3d 699, 484 P. 2d 84 (1971), the court stated:

> It seems undeniable that a routine police inventory of the contents of an automobile involves a substantial invasion into the privacy of a vehicle owner. Regardless of professed benevolent purposes and euphemistic explication, an inventory search involves a thorough exploration by police into the private property of an individual. In that process suitcases, briefcases, sealed packages, purses – anything left open or closed within the vehicle – is subjected without limitation to the prying eyes of authorities. Merely because the police are not searching with the express purpose of finding evidence of crime, the are not exempt from the requirements of reasonableness set down in the Fourth Amendment. Constitutional rights may not be evaded through the route of finely honed but nonsubstantive distinctions.

484 P. 2d at 88.

This view of the constitutional posture of the inventory search seems to be consistent with this Court's construction of the fourth amendment.

In *Camara v. Municipal Court,* 387 U.S. 523 (1967), this Court applied the fourth amendment to administrative fire and health inspections, and refused to narrow the scope of the fourth amendment to "the typical policeman's search for the fruits and instrumentalities of crime." 387 U. S. at 530. This language from *Camara* has been construed by lower courts as the Court's rejection of a restricted interpretation of the fourth amendment.

See State v. Opperman, 228 N.W.2d 152, 154 (S.D. 1975), *cert. granted,* 44 U.S.L.W. 3263 (U.S. Nov. 1, 1975)

Likewise in *Terry v. Ohio,* 392 U.S. 1 (1972), this Court stated its belief that the fourth amendment,

> governs all intrusions by agents of the public upon personal security, and . . . (makes) the scope of the particular intrusion, in light of the exigencies of the case, a central element in the analysis of reasonableness . . . This seems preferable to an approach which attributes too much significance to an overly technical definition of "search."

392 U.S. at 18, n. 15.

Since the opinion of the Fourth Circuit Court of Appeals in this case is premised on the assumption that the intrusion into the contents of the automobile was a search, this point will not be belabored at the present time. However, it should be recognized that because the inventory procedure utilized by the police in the present case is a search, it must comply with the reasonableness requirements of the fourth amendment.

EXCEPTIONS TO THE FOURTH AMENDMENT WARRANT REQUIREMENT ARE NOT DISPOSITIVE OF THE PRESENT CASE.

It is clear that, with a few exceptions, warrantless searches of private property without consent are unreasonable. *See Katz v. United States,* 389 U.S. 347 (1967). The scope of such searches has been specifically delineated to balance the need to preserve evidence and protect law enforcement officers, and the need to preserve the privacy of citizens and protect them from unwarranted and unreasonable invasions of privacy. *Chimel v. California,* 395 U.S. 752 (1969).

The automobile, however, occupies a somewhat different position with regard to searches than does a private residence. In *Chambers v. Maroney,* 399 U.S. 42 (1970), the Court explained that:

> (A)utomobiles and other conveyances may be searched without a warrant in circumstances that would not justify the search without a warrant of a house or an office, provided that there is probable cause to believe that the car contains articles that the officers are entitled to seize.

399 U.S. at 48. This distinction has arisen from two sources. One, obviously, is the highly mobile character of the automobile. The other, voiced by the court in *Cady v. Dombrowski,* 413 U.S. 433 (1973), is the fact that,

> extensive and often noncriminal contact with automobiles will bring local officers in "plain view" of evidence, fruits, or instrumentalities of a crime, or contraband.

413 U.S. at 442.

Both the courts and law enforcement officials have struggled with the application of the fourth amendment to different fact situations, and Mr. Justice Rehnquist has noted the difficulty of drawing a single, consistent thread through the decisions on the reasonableness of vehicle searches. In *Cady v. Dombrowski, supra,* he stated that:

> (T)he decisions of this Court dealing with the constitutionality of warrantless searches, especially when those searches are of vehicles. suggest that this branch of the law is something less than a seamless web.

413 U.S. at 439.

Nevertheless, there are some broad principles to be drawn from the cases involving warrantless searches of automobiles. A survey of the major cases suggests that, *under a standard of reasonableness,* warrantless searches of vehicles are to be approved only in the following circumstances:

(1) where there exists both probable cause and exigent circumstances (*i.e.,* mobility) at the time of the search, *Carroll v. United States,* 267 U.S. 132 (1925); *Chambers v. Maroney, supra;*

(2) when the search is conducted under a reasonable belief that the vehicle contains an object which might endanger the public, *Cady v. Dombrowski, supra;*

(3) when an automobile is lawfully held as evidence of a crime preparatory to forfeiture proceedings, *Cooper v. California,* 386 U.S. 58 (1967); and

(4) when there is evidence or fruits and instrumentalities of a crime within plain view inside the vehicle, *Harris v. United States,* 390 U.S. 234 (1968).

Because of the confusion that currently prevails both in the lower federal courts and in the state courts, the question which this Court must now decide is how or whether the inventory procedure at issue in the present case is to be fit into this scheme. Previous decisions of the Supreme Court have provided a broad basis of decision for lower courts in cases involving inventory type searches. For example, the Court, in *Cooper v. California, supra,* set forth a standard for testing the reasonableness of inventory searches, stating:

> While it is true, as the lower court said, that "lawful custody of an automobile does not of itself dispense with constitutional requirements of searches thereafter made of it," . . . the reason for and nature of the custody may constitutionally justify the search.

386 U.S. at 61.

This serves only as a general guideline to courts and law enforcement officials. Likewise, the Court's decisions in *Harris v. United States, supra,* and *Cady v. Dombrowski, supra,* have been widely relied upon by lower courts in decisions regarding inventory searches. Indeed, the Fourth Circuit, in the present case, relied on these cases to validate the inventory procedure of the police. However, a closer look at these cases demonstrates not only, as the district court below pointed out, that they "rely heavily upon the specific factual circumstances in which they arise," 374 F. Supp. at 697, but also that they are distinguishable from the case at hand.

It is significant that the circumstances in *Cooper* differ substantially from the facts of the present case. The circumstances which justified the warrantless search of Cooper's car following his arrest for transporting heroin were discussed in detail by the Court:

> Here the officers seized petitioner's car because they were required to do so by state law. They seized it because of the crime for which they arrested petitioner. They seized it to impound it and they had to keep it until forfeiture proceedings were concluded. Their subsequent search of the car—whether the State had "legal title" to it or not—was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained. The forfeiture of petitioner's car did not take place until over four months after it was lawfully seized. It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it.

386 U.S. at 61-62.

The circuit court below construed *Cooper* as a broad authorization for inventory searches. However, other courts have strictly limited *Cooper* to its facts, holding that warrantless searches of automobiles in police custody are reasonable only if the search is closely related to the reasons for the arrest and to the reason that the automobile is being held in custody. *Williams v. United States,* 412 F. 2d 729 (5th Cir. 1969) (discussed *infra*).

The assertion that *Cooper* should be read as a sweeping approval of inventory searches is reinforced by the Court's decision in *Harris v. United States,* 390 U.S. 234 (1968). In *Harris,* the police decided to impound the defendant's car as evidence following his arrest. Pursuant to departmental regulations, a policeman went out to inventory the car. As the policeman opened the front door of the car, he noticed the registration card of the burglary victim. The Court held that, under the "plain view doctrin," this evidence was lawfully seized. 390 U.S. at 235.

However, to read *Harris* as authorizing an inventory search of the vehicle in such a situation would be incorrect, for the *Harris* court clearly discouraged such an interpretation:

> The admissibility of evidence found as a result of a search under the police (inventory) regulation is not presented by this case. The precise and detailed findings of the District Court, accepted by the Court of appeals, were to the effect that the discovery of the card was not the result of a search of the car, but of a measure taken to protect the car while it was in police custody. Nothing in the Fourth Amendment requires the police to obtain a warrant in these narrow circumstances.

390 U.S. at 236. It is also significant that in a concurring opinion in *Harris,* Mr. Justice Douglas seemed to imply that the result would not have been the same had the search been based on an inventory theory. 390 U.S. at 237.

Likewise, in *Cady v. Dombrowski, supra,* cited by the court below (infra, pp. 9a, 10a, 12a), the reasons justifying the warrantless search of the car arose from the circumstances of that case. In *Cady,* the automobile of a Chicago policeman was taken into custody by Wisconsin police following an accident. The Wisconsin police searched the vehicle for the sole purpose of securing the service revolver which they knew the Chicago policeman was required to carry at all times. This search, which was conducted in accordance with "standard procedure" in the police department, 413 U.S. at 443, turned up evidence which linked the driver with a murder. The Court held that this search of the trunk of the car was reasonable "to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands." 413 U.S. at 443.

This account of these three cases reveals that, viewed in their respective factual settings, they do not serve as a basis for validating the inventory search in the present case or inventory searches in general.

First, it is clear that *Cooper* does not authorize the inventory in the present case because here, petitioner's vehicle was not impounded pursuant to a forfeiture action. Moreover, the reason for the impoundment of the car was not related to petitioner's arrest. Thus, the proper reading of *Cooper* seems not to be that an inventory search is required, but rather that when the vehicle is being held as evidence of a crime prior to forfeiture proceedings, such an inventory is justified.

Likewise, the holding in *Harris* appears to be limited to the "plain view" exception to the warrant requirement. In the present case, the gun discovered in the back seat of petitioner's automobile is clearly admissible under *Harris.* However, it is equally clear that the articles in the trunk do not come within this "plain view" exception.

Finally, there are factual distinctions between *Cady* and the present case. First, the petitioner had made arrangements for the safekeeping of his vehicle. More important, however, is the fact that the gun, which the police could have reasonably expected to be in petitioner's vehicle, had already been discovered when the inventory was conducted. In the present case, there was no reason for the police to believe that the car contained anything that would pose a threat to the public safety. Thus, the basis for establishing the reasonableness of the search in *Cady* is lacking here.

The district court in the present case compared *Cady* with the facts here.

> The compelling nature both of this objective (to protect the public) and of the desire to carry it out with some immediacy can be readily appreciated. There is no similar importunity involved in the making of an inventory list which might be of some use in resolving a possible future disagreement between police and a prisoner concerning whether police returned everything in his car at the time it was taken into custody. To validate the latter on the basis of the former is to say that if compelling reasons can tilt the balance in favor of a search

> then any reason can do so. When the safeguards from unjustified official intrusion set out in the fourth amendment stand on the other side of that balance, such logic must be brushed aside. The *Cady* line of precedent does not command that the search conducted in the present case be upheld.

374 F Supp. at 698 (infra, p. a).

THE CONFLICT IN THE FEDERAL COURT SYSTEM MAKES RESOLUTION OF THIS QUESTION BOTH NECESSARY AND TIMELY.

The relevant Supreme Court decisions in this area have left the various circuit courts of appeals uncertain as to the proper resolution of this narrow inventory search problem. The Fourth Circuit's opinion below reflects some of the conflict in this area, and an examination of the cases relied upon below reveals that this conflict is the result of the lack of a definitive decision by the Supreme Court regarding the fourth amendment constitutionality of inventory searches.

Most of the cases cited by the court below are so factually dissimilar to the case at hand that they should be viewed as outside the inventory search framework. All of these cases, however, demonstrate the confusion of the courts in this area. For example, in *Barker v. Johnson,* 484 F. 2d 941 (6th Cir. 1973), a case cited by the court below, the officer opened the door of the accused's car and saw two marijuana cigarettes on the floor of the driver's side. Relying on *Harris v. United States,* 390 U.S. 234 (1968), the Sixth Circuit ruled that this search and seizure was not unlawful.

> Under the rationale of *Harris v. United States,* . . . , this was a proper police function. Once the door had been lawfully opened, the marijuana cigarettes were plainly visible. It has long been settled that objects falling within plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced as evidence.

Barker v. Johnson, 484 F. 2d at 942. *Barker,* then, is not an "inventory" case at all, but fits nicely under the "plain view" exception to the warrant requirement of the fourth amendment.

Likewise, it is difficult to see the Fourth Circuit's own decision in *United States v. Sifuentes,* 504 F. 2d 845 (4th Cir. 1974), as any more than a "plain view" case. The officers in *Sifuentes* had opened the door of an impounded truck to drive it away, when they smelled the strong odor of marijuana. They immediately examined the contents of several closed boxes in the truck, all of which contained marijuana. The court held that this seizure of contraband in plain view was not violative of the fourth amendment.

Two Ninth Circuit cases are cited by the court below as upholding the reasonableness of inventory searches. In *Cotton v. United States,* 371 F. 2d 385 (9th Cir. 1967), the officers did not take anything from the car. 371 F. 2d at 390. The holding in *Cotton* was that the police action in opening the door of the defendant's car and obtaining the registration number did not constitute an unlawful search and seizure. The language by the *Cotton* court raises some doubt as to whether *Cotton* is supportive of the constitutionality of inventory procedures:

> None of the contents of the car was used as evidence against Cotton at his trial; indeed, none was removed. None of the contents was used to obtain evidence against him. Only the serial number was thus used. If the agent had found any article or paper in the car, and such evidence had been used against Cotton at his trial or to discover other evidence, we would have a different case . . . . Here, only the serial number was used. We . . . agree . . . that it is not a search at all, under such circumstances as we have here, merely to check that number in order more positively to identify the car. This, we think, is quite different from looking for evidence that may have been placed in the car by its possessor. When Cotton acquired the car, the serial number and motor number came with it. And we would limit the right to check to those cases in which there is a legitimate reason to do so.

371 F. 2d at 393.

United States v. Mitchell, 458 F. 2d 960 (9th Cir. 1972), illustrates the uncertainty which marks the decisions of lower courts in cases involving inventory procedures. In *Mitchell,* a patrolman was taking the defendant's car to the impoundment lot following defendant's arrest for speeding, when he observed several valuable watches on the front seat and a partially open sample case on the floor in front of the passenger side of the front seat. When the officer arrived at the lot, he placed the watches in the sample case. In the process, he noticed a weapon inside. He then secured the sample case and took it to the police station, where an inventory of its contents turned up 29 watches, a blackjack, and the pistol. The defendant was subsequently charged with possession of a weapon by a felon. 458 F. 2d at 960-61.

The court's approval of the officer's actions is especially significant in its emphasis on the fact that the watches were in plain view. The court noted that:

> This was responsible, indeed laudable, police conduct to protect the property of the owner of a lawfully impounded car. If valuable property had been left on the seat and floor of the car, plainly visible to anyone peering throught window, the danger of theft would have been substantial. Not surprisingly, it appears that the locking and securing of impounded cars, and the removal and inventory of valuable property within plain sight, are standard procedures. They certainly should be.

458 F. 2d at 961.

> Furthermore, the *Mitchell* court held that: (U)nder the facts of this case, the action of the patrolman in safeguarding valuable property in plain sight in a lawfully impounded car was reasonable, and hence not prohibited by the Fourth Amendment.

458 F. 2d at 961-62.

However, the *Mitchell* court limited the scope of its decision by rejecting the invitation of other courts to approve inventory searches in general:

> We are concerned only with protection of valuable property in plain view in a lawfully impounded automobile .... The patrolman did not open a closed briefcase or the trunk of the car. While it appears that he did remove watches from the glove compartment, no evidence was found there. We do not reach the question of whether any such evidence would have been admissible.

458 F. 2d at 962.

Two of the Fifth Circuit cases cited by the court below provide examples of so-called "inventories" which are best understood as limited exceptions to the warrant requirement. *United States v. Lipscomb,* 435 F. 2d 795 (5th Cir. 1970), *cert. denied,* 401 U.S. 980, *reh. denied,* 402 U.S. 966 (1971), upheld the validity of an inventory of the defendant's personal property prior to his incarceration. However, as in *Cotton, supra,* the officers in *Lipscomb* discovered no personal effects in the vehicle. The only issue was the ascertainment of the correct identification. As in *Cotton,* the court held that there is no reasonable expectation of privacy as to a vehicle's identification number. 435 F. 2d at 801.

Similarly distinguishable is *United States v. Boyd,* 436 F. 2d 1203 (5th Cir. 1971), where police officers, acting on an informant's tip, approached a car in which the suspects were travelling. When the driver attempted to escape, an officer fired three shots at the car, and a collision ensued. Following the accident, the officers towed the car to the Municipal Building, where the vehicle was routinely searched in order to inventory the articles therein. During the course of this search, stolen money orders were discovered. 436 F. 2d at 1204.

The court's primary basis for approving this search was the Supreme Court's decision in *Chambers v. Maroney,* 399 U.S. 42 (1970), which held that a warrantless station house search of an

automobile occurring sometime after an arrest was permissible if the officers had probable cause to believe that the car contained articles which they were entitled to seize. The Fifth Circuit's application of *Chambers* to the facts of *Boyd* clearly demonstrates that their decision was based on a notion that probable cause to search existed. 436 F. 2d at 1204-05.

The other Fifth Circuit cases cited by the court below, along with another Fifth Circuit case, not cited, provide perhaps the best indication of the confusion in this area. *Kimbrough v. Beto,* 412 F. 2d 981 (5th Cir. 1969), involved an inventory search of a pickup truck where the truck had been involved in an accident, and the driver had been hospitalized. Upholding the admissibility of the narcotics and narcotics paraphernalia which were discovered in the course of the inventory, the court emphasized the duty of the police to inventory the contents of the vehicle and to safeguard the possessions of the injured driver.

Similarly, in *United States v. Pennington,* 441 F. 2d 249 (5th Cir.), *cert. denied,* 404 U.S. 854 (1971), the police conducted an inventory search of an impounded vehicle while the driver was under arrest for reckless driving. A pistol was discovered in the glove compartment, and the court upheld the reasonableness of the search, again emphasizing the need for protecting the property of the arrested person. 441 F. 2d at 252. In accord with *Pennington* is *Kelehar v. United States,* 470 F. 2d 176 (5th Cir. 1972), where the policeman conducting an inventory search discovered counterfeit bills under the floor mat. The court employed a similar rationale in approving the search, saying that it fulfilled "the two-fold purpose of protecting the defendant's property and safeguarding the police from groundless claims for 'lost' possessions." 470 F. 2d at 178.

Contrary to the holdings of the cases discussed above, the case of *Williams v. United States,* 412 F. 2d 729 (5th Cir. 1969), demonstrates that there is a conflict within the Fifth Circuit itself. There, the defendant was arrested for vagrancy. The police conducted an inventory search of the trunk of defendant's car and discovered blank money orders, two check writing machines,

and a revolver. The court rejected the argument that there was a general police policy to search all impounded cars, and held that the evidence discovered in the trunk must be suppressed, stating that:

> (T)he reasons given for the search—that the police searched all impounded cars—was so vague that it could not be specifically related to anything and could not justify any warrantless search . . . . This policy of making a general search was not specifically related to the reason the car was impounded and, as we interpret the cases, will not pass muster.

412 F. 2d at 735. The fact that this case was not cited by the Fifth Circuit in *Pennington* or *Kelehar* nor by the Fourth Circuit below demonstrates the inability of the courts to agree or to reconcile the existing law on this question.

Another case, although in a district court, suggests that the law of inventory searches is far from clear. In *United States ex rel. Clark v. Mulligan,* 374 F. Supp. 989 (D.N.J. 1972), officers conducting an inventory of defendant's car discovered glassine envelopes of heroin in plain view. The court admitted this evidence, but the restrictions placed upon the scope of the search in *Mulligan* led two commentators to observe:

> In rejecting the contention that an inventory is per se unreasonable, and demanding that each factual situation be analyzed separately, the court arguably would not have allowed the search of closed areas, such as the trunk or glove compartment.

Miles and Wefing, "The Automobile Search and the Fourth Amendment: A Troubled Relationship," 4 *Seton Hall L. Rev.* 105, 141 (1972).

The Eighth Circuit's decision in *United States v. Lawson,* 487 F. 2d 468 (8th Cir. 1973), completes the picture of the conflict which currently exists among the Circuit Courts of Appeals. The

facts of *Lawson* are similar to the facts of the instant case. The defendant was placed under arrest for a charge which was not related to the charge which was subsequently filed as a result of the inventory search of the locked trunk of his car. In *Lawson,* as in the present case, the sole justification for the search was a police procedural regulation.

In considering the validity of the inventory search, the court noted the absence of definitive gudelines in these cases, stating: Lower courts have been hampered in this process by a seeming lack of consistency in the Supreme Court cases dealing with automobile searches . . . .

The Supreme Court has not decided whether an inventory search, without a warrant or justified by a recognized exception to the warrant requirement, would be considered reasonable under the Fourth Amendment.

487 F. 2d at 470.

Nevertheless, the *Lawson* court considered the existing case law and the facts of that particular case and decided that inventory searches do not meet the reasonableness requirements of the fourth amendment. First, the court noted that the argument that the inventory procedure is a reasonable way to protect the property of the accused,

> does not seem adequate to justify the substantial invasion of Fourth Amendment protections involved here. The essential test of the validity of a search is reasonableness, yet the standard of reasonableness must be evolved in light of the Fourth Amendment, not in light of what our view of reasonable police procedures might be. In addressing itself to a contention that it was reasonable to search an entire house without a warrant when a suspect is arrested in the house, the Supreme Court said in *Chimel v. California,* 395 U.S. 752, 764-65, 89 S. Ct. 2034, 2041; 23 L. Ed. 2d 685 (1969):
>
> "But that argument is founded on little more than

a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection in this area would reach the evaporation point."

We think this is a persuasive refutation of the Government's argument that because it is a "reasonable" police procedure it should be upheld under the Fourth Amendment. Obviously the police have an interest in safeguarding themselves against groundless claims. Just as obviously, and more importantly in terms of the Fourth Amendment, owners and operators of motor vehicles have an interest in safeguarding their possessions from unreasonable police intrusions. A rule that upon a showing of a legitimate governmental interest, the constitutional protections of citizens must give way, would eliminate those protections in the very situations for which they were intended. For the police practice considered here to be found reasonable under the Fourth Amendment, absent a warrant or falling within a recognized exception to the warrant requirement, there must be a minimal interference with the individual's protected rights. A police duty to safeguard the owner's property does not automatically give the police the right to search.

487 F. 2d at 475.

Commenting on the reasonableness of searching the trunk during an inventory, the *Lawson* court said:

It is unnecessary for us to determine all the reasons for, and natures of police custody that might justify a search; here the only justification for the search is bare police custody of the vehicle. While police custody may justify reasonable measures to protect the vehicle itself (*i.e.*, rolling up the windows and

locking the doors), or property within plain view in the automobile, such reasonable protective measures do not extend to breaking into a locked trunk. We find ourselves in agreement with the position taken by the California Supreme Court in addressing the contention that the inventory procedures are necessary and reasonable;

"This contention is rebutted by recognition of the vehicle owner's countervailing interest in maintaining the privacy of his personal effects and preventing anyone, including the police, from searching suitcases, and other closed containers and areas in his automobile at the time the police lawfully remove it to storage. In weighing the necessity of the inventory search as a protection of the owner's property against the owner's rights under the Fourth Amendment we observe that times of value left in an automobile to be stored by the police may be adequately protected merely by rolling up the windows, locking the vehicle doors and returning the keys to the owner. The owner himself, if required to leave his car temporarily, could do no more to protect his property."

Mozzetti v. Superior Court, 94 Cal. Rptr. at 417, 484 P. 2d at 89; *accord Boulet v. State,* 495 P. 2d at 509.

487 F. 2d at 475-76.

Thus, *Lawson* presents a view of inventory searches, which, on a similar fact pattern, is diametrically opposed to the view of the Fourth Circuit in the present case. Moreover, when these cases are combined with the conflicting case law presented by the Fifth, Sixth, and Ninth Circuits, it is clear that there exists a significant and substantial difference in fourth amendment interpretation such that this question is particularly suited to review at this time.

THE CONFLICT IN THE STATE COURT SYSTEMS MAKES RESOLUTION OF THIS QUESTION IMPERATIVE.

Given the conflict among the circuit courts, it is not surprising that there is no uniformity among the state courts on this issue. Some state courts have used an analysis similar to the analysis of the Fourth Circuit below in upholding the reasonableness of inventory searches. *See, e.g., City of St. Paul v. Myles,* 298 Minn. 298, 218 N.W. 2d 697 (1974). Other courts have taken the position that *Lawson* states the law in this area.

A recent Kentucky case held:

> Our view is that if it is reasonably necessary either to impound and store a vehicle or to leave it unattended, police officers may close and lock it, and that whatever they observe in plain view during that process may be used as evidence in support of any charge to which it may be relevant, but that the opening of or prying into compartments or containers within the vehicle constitutes a search, which in the absence of a warrant or of special circumstances as exemplified by *Dombrowski* is in violation of the Fourth Amendment.

City of Danville v. Dawson, 528 S.W. 2d 687, 691 (Ky. 1975). Two recent South Dakota cases have also suggested that a reasonable reading of *Lawson* would be that police inventory searches must be restricted to safeguarding those articles which are in plain view of the investigating officer. *State v. Opperman,* 228 N.W. 2d 152 (S.D. 1975), *cert. granted,* 44 U.S.L.W. 3263 (U.S. Nov. 2, 1975) (No. 75-76), and *State v. Catlette,* 221 N.W. 2d 25 (S.D. 1974).

This, by no means, represents an exhaustive survey of the state cases on this issue. However, this does suggest that until definitive guidelines for inventory searches are developed, the states will be faced with the same conflicting precedents that have troubled the circuit courts which have decided this question. *See* Annot., "Inventory Search of an Impounded Vehicle," 48 A.L.R. 3d 537, for a complete discussion of state cases.

THE DECISION OF THE COURT BELOW HAS GRAVE IMPLICATIONS FOR FOURTH AMENDMENT RIGHTS.

The policy considerations present in the instant case are not unlike those voiced by Mr. Justice Stewart, writing for the majority in *Chimel v. California,* 395 U.S. 752, 767 (1969). Mr. Justice Stewart pointed out the undesirable effects of *United States v. Rabinowitz,* 339 U.S. 56 (1950), which had come to stand for the proposition that a warrantless search incident to a lawful arrest could extend to the total area in the "possession" or "control" of the person arrested, and of *Harris v. United States,* 331 U. S. 145 (1947) (a different case than the *Harris* "plain view" case discussed earlier), which authorized extensive searches incident to arrest. These cases, said Mr. Justice Stewart, when applied to the fact situation in *Chimel,*

> give law enforcement officials the opportunity to engage in searches not justified by probable cause, by the simple expedient of arranging to arrest suspects at home rather than elsewhere. We do not suggest that the petitioner is necessarily correct in his assertion that such a strategy was utilized here, but the fact remains that had he been arrested earlier in the day, at his place of employment rather than at home, no search of his house could have been made without a search warrant.

Chimel, 395 U.S. at 767.

Likewise, the decision of the Fourth Circuit creates the danger that the broad category of "inventory searches" will be used to justify all warrantless searches of the vehicle of an arrested person. Indeed, as one commentator has asserted, the broad authority to conduct inventory searches ultimately results in "the elimination of probable cause as a condition precedent to a search." Comment, "The Aftermath of *Cooper v. California:* Warrantless Automobile Search in Illinois." 1968 *U. of Ill. L. Forum* 401, 407 (1968).

Thus, there is a danger that the inventory search will become nothing more than a subterfuge for warrantless searches for evidence. Defendants will be unable to demonstrate bad faith or

misconduct, just as in *Chimel* there was no way to prove that the officers delayed the arrest in order to conduct a warrantless search of *Chimel's* house. This possibility of misconduct is significantly increased when the criminal conduct does not in any way relate to the automobile, as in the instant case.

The fact that the proponents of inventory searches assert that the purpose of such procedures is not to discover incriminating evidence, but rather to protect property and to avoid false claims strains logic and dilutes the fourth amendment. In *Camara v. Municipal Court,* 387 U.S. 523 (1967), the Supreme Court, addressing the issue of administrative searches, faced a similar contention and stated:

> We may agree that a routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for fruits and instrumentalities of crime . . . But we cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely "peripheral." It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.

387 U.S. at 530.

The district court below applied this observation to the present case and noted:

> The framers of the Fourth Amendment sought not to protect criminals, but to protect from unreasonable search those in whose possession no incriminating evidence would be found. And it must be felt that the motivation behind the Amendment was not simply a sympathy with disappointment of the person searched at the discovery that he was not above suspicion, but a shared indignation at the uncontrolled official sifting and summarizing through private papers and effects which are no less part and parcel of an "inventory" than of a fruitless criminal search.

Cabbler, 374 F. Supp. at 696.

As these cases demonstrate, the lower courts' justifications for inventory searches have rested on the policies of police departments which authorize these searches. However, the Constitution does not sanction searches which would otherwise be unreasonable solely because they frequently occur.

OTHER MEANS OF ACHIEVING THE STATED GROUNDS FOR INVENTORY SEARCHES, VIZ., TO PROTECT THE PROPERTY OF THE PERSON ARRESTED AND TO PROTECT THE OFFICERS FROM FALSE CLAIMS, WHICH ARE MORE EFFECTIVE AND MORE EFFICIENT ARE AVAILABLE.

When the justifications for inventory searches are laid bare, it is clear that there exist more reasonable alternatives than the one proposed by the decision below. First of all, the approval of inventory searches on the ground that they are performed pursuant to police regulations is a "bootstrap" argument. The Constitution does not sanction unreasonable searches solely because they occur frequently. Lower courts have recognized this point. In *United States v. Chadwick,* 393 F. Supp. 763 (D. Mass. 1975), the court stated:

> The reasonableness of an inventory search is to be tested against established constitutional principles, and not on the basis of routine administrative practice.

393 F. Supp. at 766.

The circuit court of appeals in *Harris* (plain view) also commented on the effect of the police regulation:

> The entry cannot be justified merely because it was made pursuant to a police regulation. The police cannot legalize unconstitutional searches simply by promulgating and acting pursuant to regulations, no matter how reasonable they may be.

Harris v. United States, 370 F. 2d 477, 480 (D.C. Cir. 1968), *aff'd.* 390 U.S. 234 (1968).

The second, and most prevalent, justification for inventory searches is that they are necessary to safeguard the property of the arrested person and to protect the police from false claims of theft. However, when these interests are balanced against the fourth amendment interests at stake, this dual justification is clearly inadequate.

One commentator has addressed the need of the police to protect the contents of the vehicle from theft, stating:

> Arrestees should be allowed to assume the risk of loss by asking to leave their own vehicle at the roadside or by requesting that someone be contacted to pick up the car. It is true that when a car must be impounded the risk that some items will be removed when the car is taken to a garage may still be present. But even if this small risk does exist, it is unreasonable to think that the owner would exchange Fourth Amendment rights for unwanted protection against theft. In short, this supposed justification turns the Fourth Amendment on its head.

Comment, *Chimel v. California,* A Potential Roadblock to Vehicle Searches," 17 *U.C.L.A.* L. Rev. 626, 641 (1970).

Considering the practicability of the need to protect the contents of the vehicle, several courts have turned to the basic concepts of property law and pointed out that if the owner of the vehicle were to bring a civil action for loss of property, the owner would bear a substantial burden of proof.

The South Dakota Supreme Court stated:

> When in possession of an impounded car the police are acting as gratuitous depositors. S.D.C.L. 43-39-11 provides that "(a) gratuitous depository must use at least

> slight care for the preservation of the thing deposited." Certainly removal of those objects within plain view and closing of windows and locking of doors satisfies the minimal standard of "at least slight care," thus protecting the police from civil tort claims.

State v. Opperman, 228 N.W. 2d 152, 159 (S.D. 1975).

The California Supreme Court has joined in this view, stating, "In no case is an inventory of items not within plain sight essential to safeguard the contents (of a car) or to fulfill a 'slight' duty of care." *Mozetti v. Superior Court of Sacramento County,* 4 Cal. 3d 699, 484 P. 2d 84, 90 (1971).

The district court below also recognized this fact:

> To the extent that the inventory is conducted for the benefit of the owner of the vehicle, it is unclear why he cannot be asked if he wants the benefit of such protection. To the extent that the inventory is conducted to protect the police against false claims, it must be remembered that the burden of showing that any item was in fact in the car at the time of the seizure would be on the owner. Furthermore, police are required only to take reasonable precautions in light of what they reasonably believe to be in their possession. Upon a refusal to consent to an inventory, it would appear that police would be justified in assuming that they were in possession of nothing more than an automobile and its necessary accoutrements. The dangers of false claims prevailing under these circumstances, while not non-existent, are sufficiently minute to make the sacrifice of constitutionally protected interests for the purpose of further diminishing those dangers patently unreasonable.

Cabbler, 374 F. Supp. 15 700.

A further practical point on the efficacy of the inventory procedure concerns the subsequent utility of the inventory list.

An Arizona court recognized the dificiencies of this procedure.

> Unscrupulous persons who desire to steal articles will simply not list them on the inventory. Owners who wish to assert spurious claims against law enforcement officers or the garage owners can simply claim that the officers did not list them on the inventory. In fact, we can envision instances when the taking of an inventory may actually alert potential thieves to the value of items contained in the automobile.

In re One 1965 Econoline, 17 Ariz. App. 64, 495 P. 2d 504, 506 (1972); *vacated,* 109 Ariz. 433, 511 P. 2d 168 (1973).

Thus, there are several alternatives to the broad inventory search authorized by the decision below. For example, in the present case, the defendant requested that his car be left in the parking lot, since he had made arrangements to have it picked up. If the police were motivated solely by desires to protect the contents of the car, the reasonable approach would have been to lock the car and honor the defendant's request. Even after the car was impounded, there were alternatives to the inventory procedure. As the district court below pointed out, one such measure "would entail no more than the sealing of the trunk in such a way that an unbroken seal would indicate that the trunk had not been opened during police custody." *Cabbler,* 374 F. Supp. at 700.

The *Lawson* court, after considering these alternative approaches, attempted to devise an approach which would be applicable to a large number of cases:

> We think the proper approach in this area is to assess the reasonableness of the police conduct in light of all the circumstances of the case, without giving effect to the presence or absence of a police regulation. This approach does not have the surety of a rule declaring all inventory searches to be reasonable or unreasonable, and must to some extent leave law enforcement officials with some uncertainty as to what will be considered

> reasonable or unreasonable. This, however, appears to be a fact of life when dealing with Fourth Amendment problems in a variety of contexts. When unsure as to the legality of their contemplated conduct, it is always open to the police to attempt to secure a warrant in order to have a prior judicial determination of the reasonableness of their proposed conduct, though in many instances the exigencies of the situation may preclude such a course. We do not believe it possible for this court to settle this area of the law. We do think however, that it should only be in the atypical case that police officers would find it necessary to conduct a general inventory search of an impounded vehicle. The owner or operator of a vehicle may be able to take reasonable steps to safeguard his property at the time of arrest, thus obviating the necessity of impoundment in that instance, unless, of course, the automobile has been impounded as evidence or pursuant to a forfeiture statute. If the impounding is done for the stated reason, the protection of the owner's property, it is only reasonable that the owner be allowed to choose whether or not he wishes his car impounded. In cases where the owner or operator cannot make his wishes known, whether because of incapacity or absence (*i.e.* a parking violation), in most instances the property would be adequately safeguarded by rolling up the windows and locking the doors, subject, of course, to reasonable steps to safeguard property in plain view within the automobile. We think such a standard procedure would insure as well as an inventory protection against groundless claims for lost property. In the instant case, it is hard to see, when the car was locked and the windows rolled up at the time it was impounded, how the property is better safeguarded by a breaking into the car and locked trunk to inventory. In many cases, the value of the property "safeguarded" by these actions would be less than the damage caused to the automobile by these "protective" measures.

487 F. 2d at 477.

CONCLUSION

Confronted by the confusion which exists with regard to inventory searches, the Court is presented with at least three alternatives. *See Comment, supra* 1968 *U. of Ill. L. Forum* at 407, n. 63. First, the Court could adopt the decision below and issue a broad authorization of inventory searches. If this approach is adopted, the police could conduct a full search of an impounded vehicle to inventory its contents and use any evidence discovered in this search against the defendant. As pointed out above, this creates a danger of trampling fourth amendment rights by virtually eliminating probable cause as a condition precedent to search.

A second approach for the Court would be to accept at face value the present justifications for inventory searches and hold that though a thorough inventory search may be conducted to safeguard the owner's property and to protect the police, any evidence discovered in the inventory could not be used against the defendant. This approach has two serious flaws. First, as discussed above, it overstates the obligations of the police regarding impounded property. More importantly, however, this approach misinterprets the nature of the fourth amendment right. This Court has made it clear that the purpose of the fourth amendment is not to protect the accused from conviction, but to secure the right to privacy. *Griswold v. Connecticut,* 387 U.S. 479, 485 (1965); *Boyd v. United States,* 116 U.S. 616, 630 (1886). If the police are given authority to conduct a warrantless intrusion such as an inventory search, this right will be violated.

The third, and most preferable, approach for the Court would be to prohibit police from searching under the guise of the inventory search. This approach would protect the defendant's right to privacy. However, more importantly, the Court, in reaching such a decision, could produce orderly guidelines for law enforcement officials.

Such a decision would not prohibit the police from searching a vehicle where there is probable cause to do so. Rather, when police have probable cause, they may obtain a warrant. Or, where

there is probable cuase, plus exigent circumstances, police could conduct a warrantless search. Neither would the approach suggested here prevent police from seizing articles in plain view inside the vehicle. Such action clearly falls within the current "plain view" exception to the warrant requirement. Likewise, where the owner of the vehicle expresses a desire to have the contents of his vehicle inventoried, a subsequent warrantless search would clearly be valid as a consent search.

In short, the confusion which currently exists as to the proper constitutional approach to an "inventory search" such as the one in the present case could be clarified by doing away with this amorphous term and developing a rule-oriented decision based on the current exceptions to the warrant requirement. Just as the situation which existed before *Chimel* led to abuse of fourth amendment rights and ineffective law enforcement, so the present status of the inventory search creates a situation in which fourth amendment rights are ignored and law enforcement officials are uncertain as to what course of action they may constitutionally pursue.

For these reasons, it is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted

Samuel W. Tucker
Hill, Tucker & Marsh
214 East Clay Street
Richmond, Virginia 23220

Gerald G. Poindexter
Poindexter & Poindexter
304 West Cary Street
Richmond, Virginia 23220

Counsels for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 74-1555

HERBERT W. CABBLER

Appellee

v.

SUPERINTENDENT, Virginia
State Penitentiary

Appellant

ORDER

We have considered the petition for rehearing and are of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition shall be, and the same hereby is, denied.

With the concurrences of Judge Craven and Judge Field.

S/ Circuit Judge Widener
For the Court

FILED
January 13, 1976
William K. Slate, II
Clerk

A True Copy, Teste:
William K. Slate, II, Clerk
By S/ Diane Burke
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 74-1555

HERBERT W. CABBLER

Appellee

v.

SUPERINTENDENT, Virginia
State Penitentiary

Appellant

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., District Judge.

Argued February 7, 1975 Decided Dec. 8, 1975

Before CRAVEN, FIELD and WIDENER, Circuit Judges

Gilbert W. Haith, Assistant Attorney General of Virginia, (Andrew P. Miller, Attorney General of Virginia, on brief) for Appellant; (William K. Lambie, Jr., Associate Executive Director, Frank G. Carrington, Executive Director, Wayne W. Schmidt and Harrison Mann on brief for Amicus Curiae Americans for Effective Law Enforcement, Inc., and the Virginia Chapter of Americans for Effective Law Enforcement, Inc.) JeRoyd X. Greene (Greene and Poindexter, Inc., on brief) for Appellee.

WIDENER, Circuit Judge:

The petitioner Cabbler, a prisoner of the Commonwealth of Virginia, sought habeas corpus relief under 28 USC S 2254 from his convictions of grand larceny and petty larceny in the Virginia courts, alleging that evidence was admitted in his trial which had been seized from his automobile in violation of the Fourth Amendment. Based on the state record, the district court found for the petitioner, 374 F. Supp. 690 (E.D. Va. 1974), and issued the writ. From this order the Commonwealth appeals. We reverse.

Early in the morning of September 2, 1969, Cabbler was being sought by the Roanoke police in connection with a shooting incident. The police saw Cabbler's car and followed it to a Roanoke hospital. Cabbler, who was driving the car, parked it in the driveway leading to the emergency room around 1:20 a.m. and went into the emergency room. Based on telephone information that a warrant had been issued for Cabbler's arrest for a felony (shooting into an occupied dwelling), a Sergeant Reynolds of the Roanoke police entered the hospital and arrested him in the emergency room. Cabbler was searched, his car keys were taken, and then returned to him, and he was handcuffed. While he was being placed in the police car, he gave the car keys to the officers and asked them to roll up the windows of his car.[1] As the officers complied with his request, they picked up a pistol in the back seat of the car,[2] which they then seized. Leaving an officer to guard the car, Sergeant Reynolds took Cabbler to the police station and placed him in custody of other officers. Reynolds then returned to the scene and drove Cabbler's car to the police station. After

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1. The testimony is in conflict as to whether the car keys were returned to Cabbler by the officers and later given back to them.

2. There was testimony that the officers had seen the pistol in the car before they entered the hospital. The seizure of the pistol is not an issue in this case, and we note that it was in plain view regardless of when the officers first saw it. Cabbler's convictions of which he here complains were unconnected with the pistol or the shooting incident.

closing the windows, Reynolds had advised Cabbler that the car would be removed to the city garage for safe keeping, to which Cabbler did not protest, although Cabbler later testified that he had told the police to leave his car there as he had made arrangements to have it picked up.

Sergeant Reynolds testified that he had impounded the car to keep it safe until Cabbler was released. He testified that even if he had heard Cabbler say that someone was coming to get the car, he still would have impounded it, for he considered himself responsible for the safe keeping of the car and its contents after arresting Cabbler. There was a long standing police department policy to take into custody for safe keeping the automobile of a person arrested away from home, and to remove and inventory its contents to protect against theft or loss of property from the stored car and also to protect the city against false claims of loss. [3]

Pursuant to this policy, Sergeant Reynolds opened the trunk of the car, removed numerous items of personal property, and tagged them. They were turned over in the morning to the officer in charge of impounded property. Cabbler was released on bail within a few hours, and, although he claimed his car and it was returned to him at that time, he did not then or later claim the tagged personal property which was left at the police department and certain items of which were later identified as being stolen. This was the evidence introduced at Cabbler's larceny trial, and its use in that trial is challenged here.

Prior to trial on larceny charges, Cabbler moved to suppress the evidence found in the trunk of his car, arguing that the car had been illegally seized and searched, the same issue he raised in his petition below. A hearing was held on the motion, in which all the relevant facts concerning the seizure were developed. The motion was denied and petitioner was convicted at the trial. He appealed to the Virginia Supreme Court, raising the search and seizure issue

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3. Such a claim, indeed, was asserted on account of this very impoundment long before the institution of this suit in the district court.

along with other issues. The Virginia Supreme Court, in a formal opinion, affirmed his convictions, holding that the seizure of the car and the search thereof were not in violation of his constitutional rights. *Cabbler v. Commonwealth,* 212 Va. 520, 184 S.E.2d 781 (1971). Cabbler sought review in the United States Supreme Count by way of petition for writ of certiorari, which was denied. 405 US 1073 (1972).

I

The Commonwealth, in the court below, and on appeal here, argues that the claim of the petitioner is not one cognizable in a federal habeas corpus proceeding. It asks us to adopt the rationale of Mr. Justice Powell in his concurring opinion in *Schneckloth v. Bustamonte,* 412 US 218, 250 (1973), and hold that, since the petitioner was provided with a fair opportunity in the state courts to raise and have adjudicated the Fourth Amendment claim, and since his claim does not go to his innocence but rather to the police procedures used, he should not be entitled to federal habeas corpus relief even assuming we were to conclude that the adjudication of his constitutional claims was in error. It argues that "federal collateral review of a state prisoner's Fourth Amendment claims - claims which rarely bear on innocence - should be confined solely to the question of whether the petitioner was provided a fair opportunity to raise and have adjudicated the question in the state courts". *Schneckloth,* p. 250. (Mr. Justice Powell concurring). And, of course, the argument might apply with special force when a petition for certiorari has been denied. [3a]

Cabbler has had a full and fair opportunity to have his claim adjudicated in the state courts. The claim was raised, a hearing to determine the facts was held, and the state trial court and Supreme Court both specifically addressed the issue. We agree with the state

3a. The application for, and denial of, certiorari, while it emphasizes the opportunity of the prisoner to have his case adjudicated on the merits, of course " . . . imports no expression of opinion upon the merits of the case . . . . " *United States v. Carver,* 260 US 482, 490 (1923).

on this. But *Schneckloth* does not overrule *Kaufman v. United States,* 394 US 217 (1969), which holds permissible collateral review of search and seizure claims under 28 USC S 2255, and *Whitely v. Warden,* 401 US 560 (1971), *Harris v. Nelson,* 394 US 286 (1969), and *Mancusi v. DeForte,* 392 US 364 (1968), which allowed such collateral review of state convictions. Both the opinion of the court (p. 249, n. 38) and Mr. Justice Blackmun's concurrence (p. 249) indicate that the opinion does not reach these cases and finds instead that the search in issue was permissible under the Fourth Amendment. See also *Cardwell v. Lewis,* 417 US 583, 596 (Mr. Justice Powell concurring) and n. 12 (1974).

We are thus of opinion that we must reach the merits of Cabbler's Fourth Amendment claim and decline to follow the concurring opinion of Mr. Justice Powell in *Schneckloth.* On this subject generally, see *Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv. L. REv. 441 (1963).

II

When the police arrested Cabbler, they could have left the car where it was; however, it does not seem to us to be unreasonable police procedure to give protection to the personal effects of a prisoner. See *United States v. Sifuentes,* 504 F2d 845, 849 (4th Cir. 1974); *Cabbler v. Commonwealth,* 212 Va. 520, 184 S.E 2d 781 (1971). The evidence is overwhelming that the sole purpose of the impoundment was to protect the car and its contents until Cabbler could reclaim them. This is not contested anywhere in the proceeding. As the district court observed. "it would be anomalous to find that the Fourth Amendment, designed to insure the sanctity of private possessions, *compelled* the police to leave the personal effects of a prisoner . . . scattered in the street . . . . " 374 F. Supp. 690, 693. Additionally, the car in this case represented a nuisance where it was parked, in the driveway to the emergency room of a hospital. See *Cady v. Dombrowski,* 413 US 433, 447 (1973). We are of opinion that when a person is arrested away from home, the police may impound the personal effects that are with him at the time to ensure the safety of those effects or to remove nuisances from the area. See *Sifuentes,* p. 848, 849.

Harris v. United States, 390 US 234 (1968), has a similar factual basis to the one at bar. There, the suspect's car had been impounded for evidence, not for safe keeping. Operating under a

police regulation that required all impounded vehicles to be searched thoroughly and to secure all valuables in it, the arresting officer discovered incriminating evidence as he was securing a door and window. The court held that the evidence was not obtained as the result of a Fourth Amendment search. Rather, it found that the actions of the officer were taken to protect the car while it was in police custody, and "(n)othing in the Fourth Amendment requires the police to obtain a warrant in these narrow circumstances." *Harris,* p. 236. The court further stated that (t)he admissibility of evidence found as a result of a search under the police regulation is not presented in this case." *Harris,* p. 236. Here, the officers made an inventory of the contents of the auto under a department requirement of many years' standing. The Commonwealth urges us to hold that this was not a search, but rather just a housekeeping function as in *Harris.* In view of the disposition we make of the case, it is not necessary for us to reach that question, but the reasoning of *Harris* is persuasive to our holding. Assuming that the intrusion into the contents of the automobile was a search, we are of opinion it was reasonable rather than unreasonable.

In *Cady v. Dombrowski,* 413 US 433 (1973), the Supreme Court dealt with what was conceded to be a search of a car removed by the police to aprivate lot. The driver of the car was a policeman from another city. While intoxicated, he had wrecked his car and subsequently had been arrested for drunken driving. The police had his car towed to a private lot, where they later searched it for his police revolver which they believed he had with him. Their sole motive was to secure the revolver from falling into improper hands. As a result of this search, in accordance with " 'standard procedure in (that police) department'," p. 443, evidence was found to link the driver with a murder. After determining that seizure of the vehicle was lawful, the Supreme Court determined that the case was controlled by *Harris,* supra, and *Cooper v. California,* 386 US 58 (1967), even though *Harris* had been held not to be a search in the sense the word is used in the Fourth Amendment. As the court stated, "(i)n *Harris* the justification for the initial intrusion into the vehicle was to safeguard the owner's property and in *Cooper* it was to guarantee the safety of the custodians." *Cady,* p. 447. It went on to find that a search to protect the public from a dangerous weapon was also reasonable.

The search in the case at hand had two purposes: (1) to protect the owner's property and (2) to protect the city from false claims. These reasons would seem to be a reasonable basis for a search of a lawfully impounded vehicle. The fact that such protection might be accomplished by less intrusive means, such as a waiver, does not, by itself, make such a search unreasonable. See *Cady v. Dombrowski,* supra, p. 447.

In summary, we hold that the police do not violate the Fourth Amendment when they impound a vehicle to protect it or to remove a nuisance after arresting the driver away from his home, and he has no means immediately at hand for the safe keeping of the vehicle. Assuming an inventory of the contents of a lawfully impounded vehicle to be a search under the Fourth Amendment, an inventory taken of a lawfully impounded vehicle to protect the property from pilferage or the officers from false claims of loss is reasonable, and hence not in violation of the Fourth Amendment.

We follow here our reasoning in *Sifuentes,* p. 848, 849, in which the impoundment of a vehicle was authorized because "(s)ound police practices dictated impoundment of the vehicle to protect both its rightful owner and the motel." p. 849. In *Sifuentes,* we construed *Cooper, Harris, and Cady* [4] as follows:

> *Cady* limited the holding of *Preston v. United States,* 376 US 364 (1964): " . . . it stands only for the proposition that the search challenged there could not be justified as one incident to an arrest." 413 US 433, 444.

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4. *Cooper v. California,* 386 US 58 (1967), sustained as reasonable the search of an automobile impounded as evidence. In that case, the court said: "While it is true . . . that 'lawful custody of an automobile does not of itself dispense with constitutional requirements of searches thereafter made of it' . . . the reason for and nature of the custody may constitutionally justify the search." 386 US 58, 61.

> "In two recent cases, the Supreme Court held that impoundment provided a lawful reason for initial intrusion into a vehicle whose operator was detained in custody. See. e.g., *Cooper v. California,* 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967); *Harris v. United States,* 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed. 2d 1067 (1968). In a third case. *Cady v. Dombrowski,* 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973), the Court found the initial intrusion lawful after the policie had exercised control over a disabled vehicle by having it towed to a private garage, even though they had relinquished physical custody. In *Cooper,* the court justified the initial intrusion because it afforded protection for the officers; in *Harris,* the intrusion was for the justifiable purpose of protecting the owner's property; and in *Cady,* justification arose out of the necessity to protect the public. See *Cady v. Dombrowski,* 413 U.S. 433, 447, 93 S.Ct. 2523, 37 L.Ed2d 706 (1973)." 504 F2d 845, 848.

We think the intital impoundment was reasonable as a sound police practice to protect both the owner from loss and the city from damage claims. The routine inventory was likewise reasonable for the same reasons. An additional justifiable reason to impound the vehicle initially was to remove it as a nuisance in the driveway to the hospital emergency room. *Cady,* p. 447. The reasoning of *Sifuentes, Cady, and Harris* is persuasive and we base our holding on those cases.

We are accordingly of opinion that the impoundment and inventory, as a result of which the personal property introduced in evidence was discovered, was reasonable.[5]

The judgment of the district court is accordingly *REVERSED*

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5. The following cases have been found reasonable impoundment and inventory searches, either or both: *United States v. Kelehar,*

Fn 5 Continued

470 F2d 176 (5th Cir. 1972); *Barker v. Johnson,* 484 F2d 941 (6th Cir. 1973); *United States v. Mitchell,* 458 F2d 960 (9th Cir. 1972); *United States v. Pennington,* 441 F2d 249 (5th Cir. 1971); *United States v. Boyd,* 436 F2d 1203 (5th Cir. 1971); *United States v. Lipscomb,* 435 F2d 795 (5th Cir. 1970); *Kimbrough v. Beto,* 412 F2d 981 (5th Cir. 1969); *Cotton v. United States,* 371 F2d 385 (9th Cir. 1967).

Contra: *United States v. Lawson,* 487 F2d 468 (8th Cir. 1973).

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

HERBERT W. CABBLER

v.

SUPERINTENDENT, VIRGINIA STATE PENITENTIARY

FILED
April 23, 1974
CLERK, U. S. DIST. COURT
RICHMOND, VA.
CIVIL ACTION
NO. 73-538-R

MEMORANDUM

Petitioner, a Virginia prisoner, seeks habeas corpus relief from detention pursuant to his conviction of grand larceny in the Hustings Count for the City of Roanoke on February 21, 1970. As a result of that conviction petitioner was sentenced to serve a term of eleven years in the penitentiary. Jurisdiction is attained pursuant to 28 U.S.C. S 2254. State court remedies have been exhausted. The case is presently before the Court on respondent's motion to dismiss and for summary judgment. Memoranda have been received from both sides and the merits of the claims were to some extent addressed in the course of oral argument on an unsuccessful motion by petitioner for bond pending the outcome of his petition. Upon the material before it, the Court deems the matter ripe for disposition.

The following facts emerge from the petitioner's trial court transcript:

In the early morning of September 2, 1969 at approximately 1:20 a.m., Cabbler parked his Cadillac automobile on a driveway in front of the Community Hospital of Roanoke Valley and proceeded into the emergency room of the hospital (T. 38). There was some conflict in the evidence as to whether the Cadillac partially blocked the entrance to the emergency room driveway.

Cabbler testified that the car was parked in a fifteen minute zone (T. 149). The arresting officer stated the hospital regulations marked the place where the car was parked as a no parking zone (T. 65), and Cabbler's car partially blocked the emergency room driveway even though an ambulance could drive by to the emergency room (T. 82).

Cabbler was arrested inside of the hospital by a Roanoke City police sergeant, R. C. Reynolds, upon information he obtained on the telephone that a warrant was being issued against Cabbler for shooting into an occupied dwelling (T. 40 and 41). At the time of the arrest in the emergency room, Cabbler was searched and the keys to his automobile parked outside of the hospital were taken from him by Sergeant Reynolds (T. 55; T. 151; T. 153; T. 162; T. 213; and T. 254). Cabbler was taken from the hospital and placed in a police car (T. 41 and 42). It was beginning to rain and Cabbler asked one of the police officers to roll up the sindows of his automobile (T. 42); but before the windows were rolled up, Cabbler was placed in the police car. When rolling up the windows and even beforehand, the police officers observed a pistol on the back seat of the car. This pistol was taken by the officers at the time but that search is not here involved. Cabbler was then taken by Sergeant Reynolds to police headquarters in the police car (T. 48).

Cabbler testified that he had thought he would be in the hospital all night because of a gunshot wound (T. 155; first answer) and that he had called his restaurant and asked the countergirl to send one of his employees to pick up his car (T. 150). He further testified that he attempted to tell the officer that someone would pick up his car (T. 156; T. 163, first answer). In any event, Cabbler did not give the police officers permission to remove the car (T. 206; second answer) or to look in the trunk of the car and keep the property therein for safe keeping (T. 206, third answer). Further, it is undisputed that the police officers did not suspect stolen goods were in the trunk of the automobile (T. 206; fifth answer). Nonetheless, after taking petitioner to the police station, Sergeant Reynolds returned to the hospital and drove Cabbler's car to the police station as well.

The evidence is that Sergeant Reynolds' retrieval of Cabbler's car was for the purpose of keeping the car safe until Cabbler was released from jail (T. 47 and 48; T. 67 and 68; T. 202; T. 206). The established police department policy was to remove all valuables from an automobile taken into custody and return them to the owner upon his release on bail (T. 210, fourth answer). The evidence further discloses that the arresting police officer would not have left the car locked and unattended even if he had known Cabbler had someone coming to the hospital to pick up the car (T. 77). Sergeant Reynolds testified that if he had arrested Cabbler and not taken Cabbler's car into custody, he would have been responsible for all the property in the car at that time (T. 73, first answer).

When Sergeant Reynolds drove the Cadillac to police headquarters, he planned to take any property from the car and put it in the No. 2 property room on the first floor of the Municipal Building (T. 49). When he opened the trunk of the car with the key found on Cabbler's person at the time of Cabbler's arrest, Sergeant Reynolds observed that the goods in the trunk were so numerous that the No. 2 property room would not hold them. He then drove the automobile to the Municipal Building Annex and moved the goods from the trunk of the car to a property room in the basement of that building (T. 50). Because this property room in the basement was locked and the key would not be available until the next morning, Sergeant Reynolds and Police Sergeant Allen, with the possible assistance of other police officers, placed the property taken from Cabbler's car on a pool table in the basement of the building. Then they began to inventory the goods in preparation of putting them in the property room after it became accessible the next morning (T. 50 and 51). The purpose of taking the property from the locked trunk of the car was to keep it safely until Cabbler was released on bail (T. 50, last answer). Cabbler was released on bail and picked up his car within an hour or two after being arrested (T. 51, last answer; T. 257, second answer) and long before the property taken from the trunk of his car for safe keeping was removed from the pool table to a safe property room.

The evidence was that it has been the long-standing custom

of the Roanoke City Police Department to take into its possession the automobile of a person arrested and to remove from the automobile and inventory the valuable goods found therein. Apparently it is not necessary that the person arrested be in his automobile at the time of his arrest; it is only necessary that he be away from home. If a man is arrested for illegal parking, his car is not taken or his property inventoried (T. 58, line fifteen and sixteen). If he is arrested at his home, his car is not taken (T. 58). It was conceded that there was no written process to seize the car, no search warrant obtained at any time (T. 199) and no probable cause to believe stolen property was in the locked trunk of the car (T. 69) and no process to keep the property after the car was returned to Cabbler (T. 7). It is conceded by both sides that the officers in this case did not intend to search the trunk for evidence or stolen property, but to take any property therein for "safekeeping."

It was adequately proved that some of the property found in the locked trunk of Cabbler's car on September 2, 1969 was stolen property. Cabbler was convicted on five larceny charges as one who received stolen goods knowing them to have been stolen. He argues that the evidence seized in the trunk should have been suppressed.

Three legal questions are presented by the facts: (1) was seizure of the car justified; (2) did a Fourth Amendment search follow; and (3) if so, was that search reasonable.

Initially, the Court must decide whether the car itself was legally removed to the police station. The Court has no difficulty in concluding that when a legitimate arrest of a suspect is made away from his home, seizure not only of his person, but of those of his effects which are with him is justified. Given the exigencies of the typical street arrest, officers are not required to take time out from their immediate purpose to allow their suspect to put his affairs in order. Since it would be anomalous to find that the Fourth Amendment, designed to insure the sanctity of private possessions, *compelled* the police to leave the personal effects of a prisoner, be they suitcases, cars or other items, scattered in the street, the assumption of temporary possession by officers cannot

be found unreasonable under its dictates.[1] See *Cady v. Dombrowski* 413 U. S. 433, 446-47 (1973).

The second question is whether the "inventory" conducted under the facts of the instant case is a Fourth Amendment search. The Supreme Court has explicitly refrained thus far from ruling on this issue. See, *e.g., Harris v. United States,* 390 U. S. 234 (1968); *Cady v. Dombrowski, supra,* 413 U. S. 433, 442, footnote (1973). There have been state decisions finding inventory procedures to be other than "searches" on the theories that there is no intent to "seize" anything or that there is in these situations no "reason" to search or expectation that criminal evidence will be discovered. See *People v. Sullivan,* 29 N. Y. 2d 69, 323 N. Y. S. 2d 372, *cert, denied,* 399 U. S. 912 (1970). As pointed out in *United States v. Lawson,* 487 F. 2d 468, 472 (8th Cir. 1973), the above decisions are:

> . . . based on a highly technical construction of the meaning of "search," unwarranted in our view of the Fourth Amendment, To consider an inventory procedure not to be a "search" does violence to the concept

1. This does not mean that such a policy does not present serious line drawing problems. Would it be unreasonable, for example, following an arrest, to go to a suspect's apartment and seize his car parked in front of it, although that car would in many respects be equally as "abandoned". Or would it be reasonable, even were the procedure standard, to go to the arrestee's home, left unguarded in his absence, and place a police guard on it.

   If these practices were prohibited, problems would arise in the determination of how far a vehicle must be from a suspect's home before it is subject to "protective" seizure. The spectre of a somewhat different problem is raised by the present case: assuming all of the above seizures were justified by precisely the same protective argument as that set out above, would an "inventory" of the contents of such a car or apartment also be justified. While the implications of an inventory of such a car or apartment are not presented by this case, neither are they far off.

of the Fourth Amendment as a protection of the privacy of the citizenry against unwarranted invasion by government officials.

It is not the intent to seize incriminating evidence which makes governmental intrusions into private effects obnoxious in a free society, but the simple fact of intrusion itself under power of the state. [2] Thus, in *Camara v. Municipal Court,* 387 U. S. 523, 530 (1967), the Supreme Court, addressing the issue of administrative searches, wrote:

> We may agree that a routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for fruits and instrumentalities of crime . . . . But we cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely "peripheral." It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.

See also, *See v. City of Seattle,* 387 U. S. 541 (1967). In a footnote to this passage, the *Camara* court cited the reader to Mr. Justice Brennan's dissent in *Abel v. United States,* 362 U. S. 217 (1960). The language of that opinion warants extended recitation here:

2. "In our view the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of the exigencies of the case, a central element in the analysis of reasonableness . . .

   "This seems preferable to an approach which attributes too much significance to an overly technical definition of "search' . . . . "

   Terry v. Ohio, 392 U.S. 1, 18, n. 15 (1968).

One more word. We are told that the governmental power to make a warrantless search might be greater where the object of the search is not related to crime but to some other "civil" proceeding – such as matter bearing on the issue whether a man should forcibly be sent from the country. The distinction is rather hollow here, where the proofs that turn up are in fact given in evidence in a criminal prosecution. And the distinction, again, invites a trial of the officers' purposes. But in any event, I think it perverts the Amendment to make this distinction. The Amendment states its own purpose, the protection of the privacy of the individual and of his property against the incursions of officials: the "right of the people to be secure in their persons, houses, papers, and effects." See *Boyd v. United States,* 116 U. S. 616, 627. Like most of the Bill of Rights it was not designed to be a shelter for criminals, but a basic protection for everyone; to be sure, it must be upheld when asserted by criminals, in order that it may be at all effective, but it "reaches all alike, whether accused of crime or not." *Weeks v. United States, supra,* at 392. It is the individuals interest in privacy which the Amendment protects, and that would not appear to fluctuate with the "intent" of the invading officers. It is true that the greatest and most effective preventive against unlawful searches that has been devised is the exclusion of their fruits from criminal evidence, see *Weeks v. United States, supra; Boyd v. United States, supra;* but it is strange reasoning to infer from this that the central thrust of the guarantee is to protect against a search for such evidence. The argument that it is seems no more convincing to me now than when it was made by the Court in *Frank v. Maryland,* 359 U. S. 360. To be sure, the Court in *Boyd v. United States, supra,* and in subsequent cases has commented upon the intimate relationship between the privilege against unlawful searches and seizures and that against self-incrimination. This has been said to be erroneous history; if it was, it was even less than a harmless error; it was part of the process through which the Fourth

> Amendment, by means of the exclusionary rule, has become more than a dead letter in the federal courts. Certainly this putative relationship between the guarantees is not to be used as a basis of a stinting construction of either — it was the *Boyd* case itself which set what might have been hoped to be the spirit of later construction of these Amendments by declaring that the start of abuse can "only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed." 116 U. S., at 635.

362 U. S. at 254-56.[3]

More recently, in *Wyman v. James,* 400 U. S. 309 (1971), the Court again dealt with the question of what constitutes a Fourth Amendment "search" outside of the context of direct criminal investigation. There the visit of a social worker to a welfare recipient's home, refusal to allow which would result in the denial or termination of welfare payments, was considered not to constitute a search. [4] In his brief resolution of this issue, Mr. Justice Blackmun, writing for the Court, first notes:

> It is true that the governing statute and regulations appear to make mandatory the initial home visit and the subsequent periodic "contacts" (which may include home visits) for the inception and continuance of aid. It is also true that the caseworker's posture in the home visit is perhaps, in a sense, both rehabilitative and investigative. But this latter aspect, we think, is given too broad a character and far more emphasis than it deserves if it is equated with a search in the traditional criminal law context.

3. *Frank v. Maryland,* to which Justice Brennan refers, was in fact overruled in *Camara, supra.*

4. The Court, however, goes on at length to show that even if it were to be considered a search, it would be allowed under the reasonableness standard of the Fourth Amendment.

400 U. S. at 317. The fact that a general inspection is considered somewhat less intrusive than an investigative criminal search was clear in *Camara, supra.* To what extent Justice Blackmun is saying more here is unclear. From the remainder of the discussion, however, it appears that his ultimate decision is grounded not as much in the relative abrasiveness of the intrusion as in the circumstances under which any actual entry in the class of case with which he was concerned would occur:

> We note too that the visitation itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place, The aid then never begins or merely ceases, as the case may be. There is no entry of the home and *there is no search.*

400 U.S. at 317-18 (emphasis added). If such an inspection is not a search, it appears to be because any intrusion which is made is not compelled[5]. Any other reading of this language would result in the conclusion that forced admission of government personnel into all private homes for the purpose of "merely inventorying" private property or performing some other administrative or noncriminal investigative function would not constitute an intrusion against which the Fourth Amendment protected. Were the Supreme Court to take such a step, this Court is convinced that such implications would be addressed directly. In the present case, of course, no opportunity to refuse the inventory and suffer the consequences was offered. The element of compulsion is undisputed.

Thus the Court concludes that the "noninvestigative" police "inventory" is a type of official intrusion into private property and effects which the Fourth Amendment was intended to control. *United States v. Lawson,* 487 F. 2d 468 (8th Cir. 1973). The framers of the Fourth Amendment sought not to protect criminals, but to protect from unreasonable search those in whose possession

5. The Court's later discussion in which a search is assumed is prompted in part "because the average beneficiary might feel she is in no position to refuse consent to visit." 400 U. S. at 318.

no incriminating evidence would be found. And it must be felt that the motivation behind the Amendment was not simply a sympathy with the disappointment of the person searched at the discovery that he was not above suspicion, but a shared indignation at the uncontrolled official sifting and rummaging through private papers and effects which are no less part and parcel of an "inventory" than of a fruitless criminal search.

The question now becomes whether the search conducted in this case was reasonable. There is no contention that probable cause existed for the search. The argument of the Commonwealth is in fact just the opposite. It asserts the police had absolutely no reason to believe that incriminating evidence would be discovered. The inventory was conducted as a matter of standard police procedure for the purpose of ascertaining to the satisfaction of everyone involved exactly what items had been seized so that those items could be returned upon petitioner's release.

The analysis of reasonableness must begin with the Supreme Court's statement in *Chambers v. Maroney,* 399 U. S. 42, 52 (1970)[5a] that "for purposes of the Fourth Amendment there is a constitutional difference between houses and cars." This conclusion, however, is not reached *a priori,* but arises from the application of specific policy determinations.

> The constitutional difference between searches of and seizures from houses and similar structures and from vehicles stems both from the ambulatory character of the latter as well as from the fact that the extensive and often noncriminal contact with automobiles that will bring local officials in "plain view" of evidence, fruits, or instrumentalities of a crime or contraband.

Cady v. Dombrowski, supra, 413 U. S. 433 (1973). The weakened standard of review applied in car cases, which extends only to

5a. In *Chambers,* the search was upheld because supported by probable cause on the part of the officers to believe the automobile contained evidence in connection with criminal activity.

dispensing with the presumption that the absence of a warrant makes a search unreasonable, see *Cooper v. California,* 386 U.S. 58 (1967), extends only as far as the above justifications will carry it. "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge v. New Hampshire,* 403 U. S. 443, 461-62 (1971).

The respondent concedes not only that the police did not secure a warrant but that they could not have secured one. There was nothing exigent about the circumstances and there was no cause to believe anything would be found. Thus the exceptions founded upon the ambulatory nature of automobiles and the necessity of an on the spot search are here inapplicable.

The foundation of the "plain view" exception is the propriety of the officer being where he was and doing what he was doing at the time the evidence discovered came into view. Included in the calculus of this decision must be whether the police function being performed itself infringed upon the safeguards provided by the Fourth Amendment even though the seizure of evidence in plain view would, if isolated, be constitutionally unexceptionable.

In *Harris v. United States,* 390 U. S. 234 (1968), petitioner was arrested for robbery and his car, which had been identified leaving the scene of the crime, was impounded as evidence. A regulation of the District of Columbia Police Department required that an impounded vehicle be searched and that all valuables be removed. Having completed the search, an officer opened the front door of the car for the sole purpose of closing the windows and locking the doors. At that time he noted the disputed evidence lying face up on the metal door stripping.

The Supreme Court found the question presented to it to involve the isolated acts of rolling up the windows and locking the doors.

> The admissibility of evidence found as a result of a search under the police regulation is not presented by this case. The precise and detailed findings of the District Court, accepted by the Court of Appeals, were

> to the effect that the discovery of the card was not the result of a search of the car, but of a measure taken to protect the car while it was in police custody. Nothing in the Fourth Amendment requires the police to obtain a warrant in these narrow circumstances.

390 U. S. at 236. In essence, while refusing to address the full scale search which had been conducted, the Court found that the minimal protective measures of rolling up windows and locking doors of cars legally in custody did not amount to a search. Since this police conduct was not proscribed and the evidence came in plain view at that time, the evidence was admissible. [6]

Another line of cases, of which *Cady, supra,* is the culmination, indicates that, under certain circumstances, the mere fact of legitimate police custody of a vehicle is sufficient to dispense with a warrant. There is nothing in these decisions, however, to indicate that the requirement of reasonableness, in its Fourth Amendment sense, is in any way mitigated. See *Chambers v Maroney,* 399 U. S. 42 (1970) (probable cause to search the car for evidence held sufficient). Thus these cases rely heavily upon the specific factual circumstances in which they arise. As stated in *Cooper v California,* 386 U. S. 58 (1967):

> While it is true, as the lower court said, that "lawful custody of an automobile does not of itself dispense with constitutional requirements of searches thereafter made of it," . . . the reason for and nature of the custody may constitutionally justify the search.

386 U. S. at 61. The circumstances in *Cooper, supra,* which led the Court to find a search reasonable were explicitly set out:

> Here the officers seized petitioner's car because they were required to do so by state law. They seized it because of the crime for which they arrested petitioner. (transporting heroin). They seized it to impound it and they had to keep it until forfeiture proceedings were concluded. Their subsequent search of the car — whether the State had legal title to it or not — was closely related to the reason petitioner was arrested, the reason the car had been impounded, and the reason it was being retained. The forfeiture of petitioner's car did not take place until over four months after it was lawfully seized. It would be unreasonable to hold that the police, having to retain the car in their garage for such a length of time, had no right, even for their own protection, to search it. 386 U. S. at 61-62.

6. Despite the express assertion by the Supreme Court in *Harris* that its holding implied nothing concerning evidence seized in the course of a full search of a car conducted as a matter of police procedure, its holding has been taken by some courts to constitute tacit assent to inventory searches. Thus, in a breif per curiam opinion, citing only *Harris* on the issue, the Court in *Barker v. Johnson,* 484 F. 2d 941

Fn. 6 continued

(6th Cir. 1973) found that when policemen, who had gone to appellant's car to "inventory the valuables, to roll up the windows and to lock" it, opened the door and came within plain view of evidence, its discovery was not the result of an illegal search. The presumption made with rather blithe assurance by the *Barker* court, that the locking of a car's doors and the rolling up of its windows are to be equated in Fourth Amendment terms with a full scale inventory, not only does not arise from *Harris,* but the absence of any such necessary equation was there specifically pointed out. It is simply not obvious that the personal interest sacrificed in conceding to police the freedom to lock a car's doors for the owner's protection is the same as that sacrificed in granting police freedom to sift through papers and effects in a locked glove compartment or trunk. See, *supra,* at pp. and preceeding analysis. The necessary articulation of the rebalancing of interests required if *Barker* is to be read as approving inventory searches is lacking. However, the result in *Barker* is proper if the focus in that case is shifted, as was the focus in *Harris,* away from the "inventory" and toward the fact that the police had every right to open the door, for the purpose of closing the windows. Evidence then in plain view is, of course, admissible.

The facts in the present case not only bear no functional similarity to those in *Cooper,* but are extremely similar to those of *Preston v. United States,* 376 U.S. 364 (1964) which are held up by the *Cooper* Court as a foil to its own situation:

> Preston was arrested for vagrancy. The arresting officers took his car to the station simply because they did not wish to leave it on the street. It was not suggested that they did this other than for Preston's convenience or that they had any right to impound the car and keep it from Preston or whomever he might send for it. The fact that the police had custody of Preston's car was totally unrelated to the vagrancy charge for which they arrested him. So was their subsequent search of the car. This case is not *Preston,* nor is it controlled by it. 386 U. S. at *61.*

In *Cady, supra,* the reasons justifying search again arose from peculiar facts. Following an accident, the automobile of a Chicago policeman was taken into custody by Wisconsin police. As a matter of standard procedure of the department, Wisconsin officers searched the car for the driver's service revolver which they believed he was required to have with him at all times. The Supreme Court held that where "the trunk of an automobile, which the officer reasonably believed to contain a gun, was vulnerable to intrusion by vandals," a search was not unreasonable. The officers in *Cady* responded to a department policy "to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands." The compelling nature both of this objective and of the desire to carry it out with some immediacy can be readily appreciated.[7] There is no similar importunity involved in the making of an inventory list which might be of some use in resolving a possible future disagreement between police and a prisoner concerning whether police returned everything in his car at the time it was taken into custody. To validate the latter on the basis of the former is to say that if compelling reasons can tilt the balance in favor of a search

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7. While some weight is given in *Cady* to the fact that the procedure there used was "standard," this would seem to go to the issue of abuse of a facially valid search and not to validity itself. "A search which is constitutionally repugnant is surely no less offensive if carried out universally and methodically as an element of 'standard procedure'."

then any reason can do so. When the safeguards from unjustified official intrusion set out in the Fourth Amendment stand on the other side of that balance, such logic must be brushed aside. The *Cady* line of precedent does not command that the search conducted in the present case be upheld. On the contrary, the proper analysis of the balancing of the interests presented in this case was set out in *United States v. Lawson,* 487 F. 2d 468, 475-76 (1973). Since the question there raised was precisely the same as that here and the analysis particularly cogent, a considerable segment is set out below.

> The reasoning of the cases upholding inventory searches has been, except where not calling the procedure a search, that the police procedure is a reasonable one to protect the valuable property of an accused while in custody and to protect the police departments from groundless claims for "lost" property. The soundness of this conclusion has been questioned.
>
> Moreover, such a conclusion does not seem adequate to justify the substantial invasion of Fourth Amendment protections involved here. The essential test of the validity of a search is reasonableness, yet the standard of reasonableness must be evolved in light of the Fourth Amendment, not in light of what our view of reasonable police procedures might be. In addressing itself to a contention that it was reasonable to search an entire house without a warrant when a suspect is arrested in the house, the Supreme Court said in *Chimel v. California,* 395 U. S. 752, 764-765, 89 S. Ct. 2034, 2041, 23 L. Ed. 2d 685 (1969):
>
> > But that argument is founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection in this area would reach the evaporation point.

We think this is a persuasive refutation of the Government's argument that because it is a "reasonable" police procedure it should be upheld under the Fourth Amendment. Obviously the police have an interest in safeguarding themselves against groundless claims. Just as obviously, and more importantly in terms of the Fourth Amendment, owners and operators of motor vehicles have an interest in safeguarding their possessions from unreasonalbe police intrusions. A rule that upon a showing of a legitimate governmental interest, the constitutional protections of citizens must give way, would eliminate those protections in the very situations for which they were intended. For the police practice considered here to be found reasonable under the Fourth Amendment, absent a warrant or falling within a recognized exception to the warrant requirement, there must be a minimal interference with the individual's protected rights. A police duty to safeguard the owner's property does not automatically give the police the right to search.

> "(L)awful custody of an automobile does not of itself dispense with constitutional requirements of searches thereafter made of it," . . . the reason for the nature of the custody may constitutionally justify the search.

Cooper v California, supra at 61 of 386 U. S., at 791 of 87 S. Ct.

It is unnecessary for us to determine all the reasons for, and natures of police custody that might justify a search; here the only justification for the search is bare police custody of the vehicle. While police custody may justify reasonable measures to protect the vehicle itself (i.e., rolling up the windows and locking the doors), or property within plain view in the automobile, such reasonable protective measures does not extend to breaking into a locked trunk. We find ourselves in agreement with the position taken by the California Supreme Court in addressing the contention that the inventory procedures are necessary and reasonable:

> This contention is rebutted by recognition of the vehicle owner's countervailing interest in maintaining the privacy of his personal effects and preventing anyone, including the police, from searching suitcases, and other closed containers and areas in his automobile at the time the police lawfully remove it to storage. In weighing the necessity of the inventory search as protection of the owner's property against the owner's rights under the Fourth Amendment, we observe that items of value left in an automobile to be stored by the police may be adequately protected merely by rolling up the windows, locking the vehicle doors and returning the keys to the owner. The owner himself, if required to leave his car temporarily, could do no more to protect his property.

Mozzetti v. Superior Court, 94 Cal. Rptr. at 417, 484 P. 2d at 89; *accord Boulet v. State,* 495 P. 2d at 509.

> It is not as obvious to us, as it appears to be to some courts, why the inventory procedure offers the police any more protection against false claims than would a standard policy of locking the car and returning the keys to the owner; or of allowing the owner to make arrangements himself for the removal and storage of his vehicle.

One further point remains to be added. To the extent that the inventory is conducted for the benefit of the owner of the vehicle, it is unclear why he cannot be asked if he wants the benefit of such protection. To the extent that the inventory is conducted to protect the police against false claims, it must be remembered that the burden of showing that any item was in fact in the car at the time of the seizure would be on the owner. Furthermore, police are required only to take reasonable precautions in light of what they reasonably believe to be in their possession. Upon a refusal to consent to an inventory, it would appear that police would be justified in assuming that they were in possession of nothing more than an automobile and its necessary accoutrements. The dangers of false claims prevailing under these circumstances, while not

nonexistent, are sufficiently minute to make the sacrifice of constitutionally protected interests for the purpose of further diminishing those dangers patently unreasonable. A further possible police protection would entail no more than the sealing of the trunk in such a way that an unbroken seal would indicate that the trunk had not been opened during police custody.

The Court feels it appropriate to address the implications of *United States v. Robinson,* 42 U.S.L.W. 4055 (Dec. 11, 1973), which was decided after briefs in the instant case were submitted. In that case a person legitimately arrested on a traffic charge was given a thorough search of his person in the course of which several capsules of heroin were discovered. Use of the Heroin as evidence was upheld by the Supreme Court since the heroin was discovered in the course of a legitimate search incident to a lawful arrest.

> A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.

41 U.S.L.W. at 4060. However, under the principle of *Preston v. United States,* 376 U.S. 364 (1964), which was reaffirmed in the specific context presented by the case at bar in *Cady v. Dombrowski, supra,* the automobile search in this case cannot stand as a search incident to an arrest. *Cady,* decided only six months before *Robinson* and authored by the author of the *Robinson* opinion, dealt with *Preston* as follows:

> In (Preston), the police received a telephone call at 3:00 a.m. from a caller who stated that "three suspicious men acting suspiciously" had been in a car in the business

district of Newport, Kentucky, for five hours; four policemen investigated and, after receiving evasive explanations and learning that the suspects were unemployed and apparently indigent, arrested the three for vagrancy. The automobile was cursorily searched, then towed to a police station and ultimately to a garage, where it was searched after the three men had been booked. That search revealed two revolvers in the glove compartment; a subsequent search of the trunk resulted in the seizure of various items later admitted in a prosecution for conspiracy to rob a federally insured bank. In that case the respondent attempted to justify the warrantless search of the trunk and seizure of the items therein "as incidental to a lawful arrest." 376 U.S. at 367. The Court rejected the asserted "search incident" justification for the warrantless search in the following terms:

> But these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest. *Ibid.*

It would be possible to interpret *Preston* broadly, and to argue that it stands for the proposition that on those facts there could have been no constitutional justification advanced for the search. But we take the opinion as written, and hold that it stands only for the proposition that the search challenged there could not be justified as one incident to an arrest.

413 U.S. at 444. Since the facts in the case at bar for all relevant purposes parallel those in *Preston,* this search cannot be upheld on the "search incident" theory advanced in *Robinson.*

Finally, United States v. Edwards, 42 U.S.L.W. 4463 (1974), the Supreme Court's most recent Fourth Amendment pronouncement, is also of no aid to respondent. That case held only that a search otherwise proper under the "incident to a lawful arrest" exception would not be invalidated simply because it was postponed until after arrest or processing, or until the next morning. But far from constituting any vitiation of the command that searches be "reasonable," the decision is expressly grounded in

that standard. The search in *Edwards* was for evidence and probable cause existed to believe that the specific evidence sought would be found in the place searched. In the case at bar, it is conceded that there was no reason to believe evidence or contraband was concealed in the trunk. There were no exigent circumstances. There was none of the importunity of a search for weapons. There was no genuine concern on any officer's part that the car or its contents might be physically harmful. In short, there were none of the traditional indices of reasonableness to search. Nor has contemporary society evolved so far from the Founders' jealous concern for personal privacy and security, in person and effects, that a policeman's chance of marginal advantage in the event of what must be considered an unlikely civil action is now reasonable grounds for invasion of those freedoms.

For the reasons heretofore stated, the evidence seized was done so in the course of a search prohibited by the Fourth Amendment and violative of the freedom from unreasonable governmental intrusion which it protects. No reason or precedent has been advanced sufficient to justify infringement upon the Fourth Amendment interests property embodied in our fundamental law. The evidence so seized should therefore have been suppressed. The writ will issue.

S/Robert ~~A. Wheeling, Jr.~~ R. MERHIGE, JR.
United States District Judge

Date: April 23, 1974

Opinion

Richmond

Herbert W. Cabbler v. Commonwealth of Virginia

November 29, 1971

Record Nos. 7744, 7745, 7746, 7747 and 7748.

Present, All the Justices.

(1) Search and Seizure – Property of Accused Taken Into Custody – Inventory.

(2) Criminal Procedure – Instruction on Lesser Offense.

1. Public policy dictates that citizen's rights in his property shall be preserved. Police procedure to protect property of citizen arrested away from home approved. When arrested at hospital on another charge, defendant had parked his automobile improperly. Defendant was advised that automobile would be removed to city garage for safekeeping. Before storage, contents were removed for inventory. Stolen goods discovered were admissible in evidence.

2. Commonwealth's election to proceed against defendant for the greater offenses of larceny and petit larceny, under the general larceny statutes, does not preclude giving instruction on and conviction of defendant on lesser offense of larceny by receiving stolen property.

Error to a judgment of the Hastings Court of the City of Roanoke. Hon. Ernest W. Ballou, judge presiding.

Affirmed.

John H. Kennett, Jr., for plaintiff in error in Record Nos. 7744, 7745, 7746, 7747 and 7748.

Gilbert W. Haith, Assistant Attorney General (Andrew P. Miller, Attorney General, on brief), for defendant in error in Record Nos. 7744, 7745, 7746, 7747 and 7748.

Harman, J., delivered the opinion of the court.

The defendant, Herbert W. Cabbler, appeals from five final orders sentencing him to a total of eleven years in the state penitentiary

and fines totaling $1,000.00. Cabbler was convicted on three counts of grand larceny and two counts of petit larceny after a consolidated trial by jury. The jury's finding in each instance was that the larceny was committed by receiving stolen property.

The defendant claims that the trial court erred in three respects. These are: (1) the admission in evidence of stolen goods found in Cabbler's car; (2) the granting of any instructions on receiving stolen property when the Commonwealth elected to rely on the general larceny statutes for conviction; and (3) the granting of other instructions tendered by the Commonwealth setting forth the presumptions which arise from the possession of recently stolen property.

I

The defendant was arrested at approximately 1:30 a.m. on September 2, 1969, at Community Hospital in Roanoke by Sergeant R. C. Reynolds of the Roanoke Police Department on a felony charge (shooting into an occupied dwelling). The validity of this arrest is not challenged.

Sergeant Reynolds had observed Cabbler enter the hospital after parking his Cadillac automobile. The car was parked in a no parking zone on a private driveway belonging to the hospital in such a manner as to partially block the ambulance driveway leading to the hospital emergency entrance.

After Cabbler's arrest he asked Reynolds to close the windows on his car, which he pointed out to the officer, as it was raining. Reynolds, after closing the car windows, advised Cabbler that the car would be removed from the hospital driveway to the City Garage for safekeeping until Cabbler's release from custody. Cabbler made no complaint or protest to this although he later testified at trial that he had already arranged to have the car "picked up" by one of his employees.

The car, before being stored in the City Garage, was taken to the police property room where the contents of the car were to be removed, inventoried and stored for safekeeping. It was then that the police discovered the stolen goods that resulted in Cabbler's later convictions.

The defendant argues that discovery of the contraband resulted from an unlawful search and seizure and that this evidence should have been suppressed by the trial court.

(1) The Attorney General does not attempt to justify discovery of the stolen goods as a search incident to a lawful arrest. He says that the action of the police in removing Cabbler's car from the driveway of the hospital to a place of safekeeping and the removal and inventory of the contents of the car were reasonable acts performed under procedures established by the Roanoke Police Department for the protection of property in the possession of a person arrested away from his place of residence.

The evidence disclosed that the procedure followed in this case was the result of a long-standing practice and policy of the Roanoke Police Department. One witness testified that this policy was already in effect when he was first employed, more than 28 years earlier, by the department. The policy is that the police, when arresting a person away from his place of residence in possession of property, including automobiles, will take temporary custody of the property for safekeeping unless other immediate means are available to protect such property.

Prior to 1964 or 1965 it was not customary to remove, inventory and separately store the contents of vehicles which came into possession of the police for safekeeping unless the police were specially requested to do so. In 1964 or 1965, however, complaints were made and claims for reimbursement filed by the owners of vehicles who claimed property was lost or stolen while their cars were so stored. The procedure for removal, inventory and separate storage of the contents of vehicles in safekeeping was instituted then in an effort to prevent theft or loss of property from stored vehicles.

It has always been the public policy of the Commonwealth to preserve and protect the individual rights of its citizens. Public policy also dictates that a citizen's rights in his property shall likewise be preserved and protected. Thus it would appear, and we so hold, that the policy established and the procedure followed by the Roanoke Police Department to protect the property of a citizen arrested away from his home in possession of property

where no other immediate means is available for safekeeping of such property are reasonable and in accord with the public policy of the Commonwealth set forth earlier.

The Fourth Amendment does not forbid all searches and seizures but only those that are unreasonable. *Terry v. Ohio,* 392 U.S. 1, 9 (1968); *Kirby v. Commonwealth,* 209 Va. 806, 167 S.E. 2d 411 (1969). Whether a particular search is unreasonable within the meaning of the Fourth Amendment depends upon the particular facts and circumstances of the case. *Dyke v. Taylor Implement Mfg. Co.,* 391 U.S. 216 (1968); *Cooper v. California,* 386 U.S. 58, 59 (1967); *Preston v. United States,* 376 U.S. 364, 366-67 (1964).

The Fourth Amendment does not preclude the state from developing workable rules governing arrests, searches and seizures to meet the practical demands of effective criminal investigation and law enforcement in the states, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence illegally seized is inadmissible. *Ker v. California,* 374 U.S. 23, 24 (1963); *Sibron v. New York,* 392 U.S. 40, 60-61 (1968).

Upon the facts before us we hold that the policy established by the Roanoke Police Department and the procedure followed in connection therewith are such reasonable rules governing arrests as were contemplated in *Ker and Sibron.* Such a policy is in accord with the public policy of the Commonwealth, is not violative of the defendant's Fourth Amendment rights and serves the best interest of the property owner by protecting and safeguarding the property in his possession at the time of his arrest.

We therefore find this assignment of the defendant to be without merit.

II

(2) Next we consider the defendant's claim that the trial court erred in instructing the jury on receiving stolen property when the Commonwealth had elected to rely upon the general larceny statutes for conviction.

The five indictments against the defendant charged him with three counts of grand larceny under Code S 18.1-100 and two counts of petit larceny under Code S 18.1-101.

Prior to trial the defendant demanded, as he was entitled under Code S 18.1-109, that the attorney for the Commonwealth advise him of the statute relied on to ask for conviction in each case. He was advised that the Commonwealth elected to rely on the statute as set forth in each of the indictments. [1]

In the trial court the defendant objected to the giving of instructions on receiving stolen property on the ground that the Commonwealth had elected to rely on the general larceny statutes and not on Code S 18.1-107 which reads in pertinent part:

"If any person . . . receive from another person . . . any stolen goods . . . knowing the same to have been stolen, he shall be deemed guilty of larceny thereof . . . ."

He argues here, as he did below, that the failure of the Commonwealth to specify Code S 18.1-107 in its election precluded the court from instructing the jury on larceny by receiving stolen goods.

Larceny by receiving stolen goods is a lesser offense which is included in the major one of larceny. *Branch v. Commonwealth,* 184 Va. 394, 35 S.E. 2d 593 (1945); see also *Dove v. Peyton,* 343 F. 2d 210 (4th Cir. 1965). The lesser offense is indictable as larceny, *Clark v. Commonwealth,* 135 Va. 490, 115 S.E. 704 (1923), and the accused may be convicted of the lesser offense of receiving stolen goods. *Stapleton v. Commonwealth,* 140 Va. 475, 124 S.E. 237 (1924).

Thus the Commonwealth's election to proceed against the defendant for the greater offenses under the general larceny statutes did not preclude the giving of instructions on and the conviction of the defendant of the lesser offenses of larceny by receiving stolen property.

1. The three grand larceny indictments referred specifically to Code S 18.1-100 and both of the petit larceny indictments referred to Code S 18.1-101.

III

The defendant's argument that the court erred in the instructions granted explaining the presumptions which arise from possession of recently stolen property is without merit.

Affirmed.

In The

Supreme Court of the United States

October Term, 1975

No. 75-1463

HERBERT W. CABBLER,
Petitioner,

v.

SUPERINTENDENT, VIRGINIA STATE PENITENTIARY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ANDREW P. MILLER
Attorney General of Virginia

GILBERT W. HAITH
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

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In The

Supreme Court of the United States

October Term, 1975

No. 75-1463

HERBERT W. CABBLER,

Petitioner,

v.

SUPERINTENDENT, VIRGINIA STATE PENITENTIARY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, the Superintendent of the Virginia State Penitentiary, an employee of the Commonwealth of Virginia, respectfully submits the following brief in opposition to the granting of a writ of certiorari in the above matter. The parties will be referred to herein by their respective positions in the court below, i.e., petitioner and respondent, or by their respective positions in the state trial court, i.e., defendant and Commonwealth.

QUESTION PRESENTED

Did the United States Court of Appeals for the Fourth Circuit commit error in denying and dismissing a petition

for a writ of habeas corpus on the ground that the seizure of evidence from the trunk of petitioner's vehicle during an inventory of the contents of such vehicle while impounded by the Roanoke, Virginia, police department was not a violation of petitioner's Fourth Amendment rights?

STATEMENT OF THE CASE

The petitioner was convicted in the Circuit Court of the City of Roanoke, Virginia, on February 21, 1970, of three counts of grand larceny and two counts of petty larceny, pursuant to trial by jury, and was sentenced to a total of eleven years in the Virginia State Penitentiary. Prior to petitioner's trial, he moved to suppress certain evidence obtained by officers of the Roanoke City Police Department from the trunk of his automobile, which items of evidence were eventually used in petitioner's trials and were the basis for his conviction. A hearing was held on said motion to suppress and the motion to suppress was overruled. All of the evidence relating to whether or not said evidence was obtained as the result of an illegal search and seizure was developed at the hearing on the motion to suppress.

Following petitioner's convictions, he appealed to the Virginia Supreme Court by way of direct appeal, assigning as error, along with other matters, the admission in evidence of the items found in the trunk of his car on the basis of an allegation of illegal search and seizure. Petitioner's conviction was affirmed, and the admission into evidence of the items removed from the trunk of petitioner's car was found not to be an illegal search and seizure by the Virginia Supreme Court on direct appeal. *Cabbler* v. *Commonwealth,* 212 Va. 520, 184 S.E.2d 781 (1971).

Petitioner then appealed to this Court by way of a petition for a writ of certiorari, and said petition for a writ of

certiorari was denied by an order entered April 17, 1972, 405 U.S. 1073 (1972).

Petitioner then filed a petition for a writ of habeas corpus in the United States District Court, Eastern District of Virginia, Richmond Division, alleging that the goods taken from the trunk of his car and admitted into evidence at his state court trial were taken pursuant to an illegal search and seizure and, therefore, were improperly admitted. Respondent filed a responsive pleading asserting that said allegation was without merit and that the stolen property used in petitioner's trial was not obtained as the result of an illegal search and seizure, but was obtained as a matter of proper procedure by the Roanoke Police Department as a result of the inventory of the petitioner's impounded automobile.

The District Court granted the petition for a writ of habeas corpus by a memorandum opinion and order dated April 23, 1974, 374 F.Supp. 690 (E.D. Va. 1974), on the basis that said search and seizure was in violation of petitioner's constitutional rights under the Fourth Amendment to the United States Constitution. Upon appeal by the respondent, the United States Court of Appeals for the Fourth Circuit reversed the district court. It is from this decision that the petitioner is applying for certiorari.

As pointed out above, all of the facts relating to the seizure of certain items from the trunk of petitioner's automobile, which items were subsequently determined to be stolen and were used to obtain the convictions of the petitioner, were presented to the state trial court through a hearing on a motion to suppress said evidence.

Those facts showed that in the early morning on September 2, 1969, Roanoke, Virginia, City Police officers were looking for the petitioner because they knew that the victim of an alleged felonious shooting into an occupied building

was on his way to swear out a warrant for the petitioner. The petitioner's car was spotted by police officers in downtown Roanoke and was followed to the Community Hospital of Roanoke Valley, where the petitioner had parked his car in a "No Parking" zone and in a position which partially blocked the driveway to the emergency room of said hospital and the entranceway used by emergency vehicles attempting to get to the emergency room entrance. It was agreed that all of the area in question where the petitioner's vehicle was parked is private property in which parking and traffic regulations are made by the hospital management.

The petitioner and a passenger in the car alighted and went into the emergency room. Police Sergeant R. C. Reynolds observed a pistol and boxes of ammunition in the back seat and back floor board of the car and stationed a police officer to guard the car while, he, Sergeant Reynolds, went inside the hospital. After going into the hospital, Sergeant Reynolds called the magistrate on duty and determined that a felony warrant had been issued for the petitioner. He then proceeded to arrest the petitioner in the hospital emergency room where the passenger, who had gotten out of the car with the petitioner, was undergoing medical treatment. As the petitioner was arrested, he was advised of his Constitutional rights and was handcuffed and was taken out of the hospital emergency room to a nearby police car.

It was starting to rain as the petitioner and Sergeant Reynolds left the emergency room, and the petitioner asked Sergeant Reynolds to roll up his car window, indicating the 1967 Cadillac in which the pistol and ammunition had already been seen. The car keys were removed from the defendant's pocket at this time, and then Sergeant Reynolds took the petitioner to the police car and proceeded to roll up the car windows. It was necessary to get the key from

the petitioner, because the windows were of the push button type and the ignition had to be turned on in order to roll up the windows.

Sergeant Reynolds went to the petitioner's car, closed the windows, removed the pistol and ammunition, and stationed another officer to guard the car until he could return. At this time Sergeant Reynolds advised the petitioner that his car would be taken to the city garage and stored there for him until he was able to post bond on the felony charge for which he was being arrested. Sergeant Reynolds then drove the petitioner to the municipal building to be "booked" and turned him over to other police officers. Sergeant Reynolds was driven back to the Community Hospital where he got into the petitioner's Cadillac automobile and drove it to police headquarters.

While parked outside the Roanoke Municipal Building, Sergeant Reynolds opened the trunk of the petitioner's automobile with the keys he had obtained from the petitioner. His intention at that time was not to search for evidence of any crime, but merely to remove any personal property or other valuables from the car and to store them in the Police Department property room, located in the main Municipal Building. Upon seeing a large quantity of clothing and other personal items in the trunk of the car, Sergeant Reynolds quickly concluded that the property room in the main Municipal Building was too small for his purposes, so he drove the car a block away to a point beside the Municipal Building Annex in which the Police Department's larger, principal property room is located.

There, Sergeant Reynolds and several other officers systematically removed and tagged for identification the numerous items of clothing and personal property which constituted the contents of the trunk of the petitioner's automobile. All of this property was guarded by a police officer

until the property officer arrived later that morning. It was then stored in the main property room. Some of this property, which was never claimed by the petitioner upon his release from custody, turned out to have been stolen and was introduced at the petitioner's trial as evidence against him.

Each of the officers who participated in the guarding and inventorying of petitioner's automobile testified at the hearing on the motion to suppress. None of these officers testified that the purpose of the inventory was to "Search" for evidence of any crime or to perform any function other than finding, identifying, and storing the petitioner's valuables for safekeeping while he was in custody and while his car was in the possession of the Police Department. None of these officers heard the defendant protest the police officers taking temporary custody of his vehicle or any offer by the petitioner to have the car moved from its hazardous location by any other means.

The evidence was uncontradicted that the inventory of the petitioner's automobile was conducted solely to safeguard the petitioner's valuables and was conducted pursuant to long-standing practices of the Roanoke Police Department. Several officers testified as to the circumstances under which it was their practice to take temporary custody of property, such as vehicles belonging to arrested individuals, and numerous illustrations were given. The evidence in this regard was that whenever a person is arrested away from his home under circumstances in which valuable personal property will be left "stranded" as a result of the actions of the police in making the arrest, and no other measures to safeguard the valuables are apparently available, the police will take into temporary protective custody such items of personal property, including automobiles, and will store them in an appropriate place, pending release of the ar-

rested individual from custody. Because of certain unfortunate instances of theft in the past, the police officers had been instructed not to surrender custody of automobiles so impounded to personnel at the City Garage until an itemized list of the automobile's contents had been made, and such contents had been removed and stored for safekeeping in one of the Police Department property rooms. The original taking into custody of the arrested person's property does not turn on whether the property is located on public or private property at the time of the arrest, so long as the fact of the arrest itself would leave the property unprotected if the police were not to assume custody of it. In at least one instance in the past, the Police Department had been subjected to civil suits upon claims for property having disappeared during the time that an automobile was in police custody, and the evidence was that the petitioner himself had made such a claim prior to the actual initiation of these criminal proceedings concerning this particular impoundment of his automobile.

There was no evidence that the above-stated policy, which had at least once in the past been reduced to writing and promulgated by the Chief of Police, though such written regulations could not be found, had been applied in this or in any other case in a discriminatory manner, nor was there evidence that the officers in the instant case were not acting in a good faith effort to execute such policies. There was no evidence that the arrest of the defendant was any kind of a "sham" or pretext for "searching" his automobile, or that even the initial taking of the car into custody was done upon such pretext. Rather the impoundment of the vehicle was for the stated purposes of eliminating the emergency traffic hazard posed by the car in its location, as it had been left parked by the petitioner, and for the pro-

tection of the petitioner's own personal property from theft by others.

LAW AND ARGUMENT

Initially, the respondent submits that the removal from the petitioner's automobile by the police of the items of personal property was not a "search" in the Constitutional sense, because the police were not looking for evidence of any particular crime. A search, within the confines of the Fourth Amendment, implies some exploratory investigation. A "search" in the Constitutional sense implies an invasion and quest, a looking for or seeking out; prying into hidden places for that which is concealed. There was no "search" in the instant case, but only a taking of the articles into protective custody. There is no search where the officers are engaged in legal, non-search activity, and items are observed in plain view. See *People* v. *Norris,* 68 Cal. Rptr. 582 (1968); *State* v. *Dombrowski,* 171 N.W.2d 349 (Wisc. 1969); *State* v. *Wallen,* 185 Neb. 44, 173 N.W.2d 372 (1970).

In the instant case the taking into custody of the petitioner's vehicle was in no way connected with his arrest for a shooting incident, but was done in order to remove it from obstructing the entrance to the hospital, and to protect it while the defendant was in custody. It was done as a matter of standard operating procedure of the Police Department, and the police had no intention at any time of trying to use the automobile or its contents as a part of any criminal charges against the petitioner.

The same applies to the removal of the goods from the trunk of the car and the placing of them in the police property room. At no time during this procedure did the police have any intention other than the protection of the petitioner's property, and it was all done pursuant to longstanding Police Department policy. Having lawfully taken charge of the defendant's automobile, it was incumbent upon the police to ascertain its contents and to store them safely. To protect themselves as well as the defendant, a reasonably prudent officer could and should have made an itemized list of all valuable personal property in the car.

It has been recognized by this Court that every physical intrusion into a citizen's property does not imply a "search" of that property, if that is not the intent of the officer making the entry. *Harris* v. *United States,* 390 U.S. 234, 19 L.Ed.2d 1067, 88 Sup.Ct. 992 (1968). In that case the investigating officer discovered evidence against the accused while opening the door of his car in order to protect the car from the rain. While it was held that this was specifically not a case involving the inventory of the contents of a vehicle, it is still an extremely analogous case, because it involves evidence obtained while attempting to protect the property of an individual who is in custody, and not as a part of any search. The intent in each situation is very important. As said by the Court in the *Harris* case:

> ". . . the discovery of the card was not the result of a search of the car, but of a measure taken to protect the car while it was in police custody. Nothing in the Fourth Amendment requires the police to obtain a warrant in these narrow circumstances."

It would appear clear that this language in *Harris* is still viable and that the question is still open as to whether activity of the police, such as in the instant case, is even a "search" in the first place. See *Cady* v. *Dombrowski,* 413 U.S. 433, 37 L.Ed.2d 706, 93 Sup.Ct. 2523 (1973), footnote at 413 U.S. 442.

Both the District Court and the Fourth Circuit in the

instant case recognized that this argument has some validity, but did not rely on such for their respecive holdings for differing reasons. In particular the Fourth Circuit implied that it could have reversed the District Court on the basis that this situation did not involve a Fourth Amendment search, but it was not necessary to do so.

The petitioner attempts to reject this proposition, as did the District Court, primarily on the authority of *Camara* v. *Municipal Court,* 387 U.S. 523, 18 L.Ed.2d 930, 87 Sup.Ct. 1727 (1967), and its progeny. The respondent submits that this reliance is misplaced, not only because the factual situations are so entirely different, but furthermore because the language in *Harris* referred to above is much closer to the factual situation in the instant case than is the language in *Camara.* This Court has consistently held that there are situations which are, in fact, not searches in the Constitutional sense, and the respondent submits that the instant case is, in fact, one of those cases, and that the language of *Harris* v. *United States, supra,* is determinative of that.

Assuming arguendo that the taking of the personal property from the trunk of the petitioner's car was a search, then the question becomes one of whether the search conducted in the instant case was reasonable. No attempt has ever been made by the Commonwealth to justify this search on the grounds of a search incident to an arrest or the grounds of having probable cause therefor. The Commonwealth has consistently maintained that the taking of the personal property from the petitioner's automobile was pursuant to a proper police procedure for inventorying the contents of automobiles of persons taken into custody, and that such an inventory search is *reasonable* and not a violation of petitioner's Fourth Amendment rights. This is, in effect, the classic example of so-called "inventory searches."

Respondent submits, as concluded by the Court of Ap-

peals, that the instant case is clearly controlled by the decisions of this Court in *Harris* v. *United States, supra* and *Cady* v. *Dombrowski, supra.* Although the language of the opinion in *Harris* indicates that it is not to be construed as a determination of the admissibility of evidence found as a result of a *search* under such a Police Department regulation, the respondent submits that from a practical and factual standpoint there is nothing to distinguish the instant case from *Harris* v. *United States.* In both cases the action taken by the police department was action taken solely and totally for the purpose of protecting the property of a person who was in custody and who was incapable of protecting his own property. The action taken by the police in both cases was reasonable and was calculated as to be appropriate action that would have been demanded by the person in custody if the Police Department had not done it. Once the Police Department was taking such protective action, the seizing of contraband or other items of evidence was not an illegal search and seizure.

Even greater similarity can be found between the facts in the instant case and the facts in *Cady* v. *Dombrowski, supra.* In that case, the Court found two factual considerations deserving of emphasis. The first was that the police had exercised a form of custody or control over the defendant's vehicle for the purpose of safety and protection and, secondly, the opening of the trunk of that vehicle and the seizing of items of personal property therein was standard procedure in the Police Department to protect the citizens and the public. Both of these same factual considerations are present in the instant case. In *Harris* the justification for the initial intrusion into the vehicle was to safeguard the owner's property, and in *Cady* the justification for the intrusion into the vehicle was concern for the safety of the general public. In the instant case, the motivation on the part of the of-

ficers in taking an inventory of the contents of the trunk of defendant's vehicle was at least as viable and reasonable a motivation as those. Respondent submits that the opinion in *Cady* v. *Dombrowski, supra,* sufficiently shows that the search of the petitioner's trunk in the instant case was a reasonable search and, therefore, not a violation of the Fourth Amendment strictures on search and seizure.

Not only is the instant case controlled by *Harris* and *Cady* v. *Dombrowski,* but it also is directly in line with other decisions of federal courts upholding inventory searches as reasonable where conducted for the two-fold purpose of protecting the defendant's property and safeguarding the police from groundless claims for loss of possessions. *United States* v. *Kelehar,* 470 F.2d 176 (5th Cir. 1972); *Barker* v. *Johnson,* 484 F.2d 981 (6th Cir. 1973); *United States* v. *Mitchell,* 458 F.2d 960 (9th Cir. 1972); *United States* v. *Pennington,* 441 F.2d 249 (5th Cir. 1971); *United States* v. *Boyd,* 436 F.2d 1203 (5th Cir. 1971); *United States* v. *Lipscomb,* 435 F.2d 795 (5th Cir. 1970); *Kimbrough* v. *Beto,* 412 F.2d 981 (5th Cir. 1969); *Cotton* v. *United States,* 371 F.2d 385 (9th Cir. 1967).

In *Barker* v. *Johnson, supra,* the defendant was arrested and was in custody and his car was parked in front of the police station. The car was opened by the police in order "too inventory the valuables, to roll up the windows, and to lock this car for the sole purpose of protecting the car and its contents while the owner was in lawful custody." The court found that this was a proper police function under *Harris* and that the contraband which was eventually seized was in plain view once the officers were inside the automobile, a place where they had a right to be. Respondent submits that the reasoning applied in that case is just as applicable to the instant case.

The practice of protecting whatever valuables may be in an impounded vehicle by storing them in the police station is not only reasonable, but it is also in the public interest where it is not used as a subterfuge to conduct a search without a warrant. It is not unusual for items to disappear from parked vehicles in spite of locked doors. The Fourth Amendment does not proscribe *all* searches, but only those that are unreasonable. When an inventory is performed as a service to an individual, evidence of a crime accidentally discovered need not be suppressed.

In at least two cases cited above, *United States* v. *Lipscomb, supra,* and *United States* v. *Boyd, supra,* the Court talks in terms of the police officers, in fact, owing a *duty* to inventory the contents of impounded vehicles. These statements are to the effect that the inventory is necessary to protect the property of the person in custody and to safeguard the police from groundless claims for loss of possessions. Once the car is taken to the police headquarters, the police are under a *duty* to itemize the property contained therein and store it for safekeeping. See also *Cotton* v. *United States, supra; Heffley* v. *State,* 423 P.2d 666 (Nev. 1967); *State* v. *Wallen, infra.*

It is obvious that in inspecting vehicles they take into custody, the police are not seeking evidence of crime, but are pursuing precautions which any bailees of personal property would be expected to take as a matter of reasonable care for the benefit of the absent owner of the vehicle and as a safeguard against claims of loss or damage. In the instant case, to say that they could have been less careful and locked it up and left it on the hospital lot, or towed it to the impoundment lot without conducting the inventory of the contents does not make their more cautious and more careful action and their greater care unreasonable or unconstitutional.

The District Court, and the petitioner herein, place great emphasis on *United States* v. *Lawson,* 487 F.2d 468 (8th Cir. 1973). Respondent says that reliance upon *Lawson* is no more apropos to the instant case than is reliance upon all of the other cases cited by the respondent. In fact, the court in *Lawson* specifically found that the police had no right to impound the vehicle in question in the first place. It was on a motel parking lot, was not obstructing anything, and no request from the defendant had been made to protect it in any way. These same factors were used by the court to distinguish the situation in *Lawson* from the situation in *Cady* v. *Dombrowski.* Yet, the petitioner in the instant case attempts to avoid the import of *Cady* v. *Dombrowski* by stating that said case does not indicate that the requirement of reasonableness is any way mitigated. Respondent agrees with this statement and that there is still a requirement of reasonableness, but submits that in *Cady* v. *Dombroski, supra,* this Court placed its stamp of approval on inventory searches of automobiles where the ultimate standard of reasonableness is met. Respondent submits that such standard of reasonableness has been met in the instant case. By the same reasoning, since *United States* v. *Lawson, supra,* is distinguishable factually from the instant case, it does not indicate any real conflict between the lower courts on the real issue of inventory searches.

Respondent further submits that the upholding of reasonableness of the inventory search in the instant case is directly in line with the overwhelming weight of authority of those decisions by state courts which have upheld inventory searches of automobiles. *Plitko* v. *State*, 11 Md.App. 35, 272 A.2d 669 (1971); *St. Clair* v. *State,* 1 Md.App. 605, 232 A.2d 565 (1967); *State* v. *Hock,* 54 N.J. 526, 257 A.2d 699 (1969); *People* v. *Norris,* 68 Cal. Rptr. 582 (1968); *People* v. *Sullivan,* 29 N.Y.2d 69, 272 N.E.2d 464 (1971);

State v. *Dombrowski,* 171 N.W.2d 349 (Wis. 1969); *State* v. *Wallen,* 185 Neb. 44, 173 N.W.2d 372 (1970); *People* v. *Willis,* 46 Mich. App. 436, 208 N.W.2d 204 (1973) (dictum); *Heffley* v. *State,* 423 P.2d 666 (Nev. 1967); *State* v. *Montague,* 73 Wash.2d 381, 438 P.2d 571 (1968); *State* v. *Criscola,* 21 Utah 2d 272, 444 P.2d 517 (1968); *People* v. *Trusty,* 516 P.2d 423 (Colo. 1973); *Denson* v. *State,* 128 Ga.App. 456, 197 S.E.2d 156 (1973); *Godbee* v. *State,* 224 So.2d 441 (Fla. 1969); *Jackson* v. *State,* 243 So.2d 396 (Miss. 1971); *State* v. *Gwinn,* 301 A.2d 291 (Del. 1973). See contra: *Mozzetti* v. *Superior Court,* 94 Cal. Rptr. 412, 484 P.2d 84 (1971); *Boulet* v. *State,* 17 Ariz. App. 64, 495 P.2d 504 (1973).

CONCLUSION

For the reasons set out herein, and set out in the opinion of the Fourth Circuit, it is submitted that no error was committed by the state trial court or by the Fourth Circuit Court of Appeals, and no substantial reasons exist for the granting of certiorari and that the petition for a writ of certiorari be denied.

Respectfully submitted,

ANDREW P. MILLER
Attorney General of Virginia

GILBERT W. HAITH
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I hereby certify that on or before the 24th day of June, 1976, three copies of this brief were mailed to Samuel W. Tucker, Hill, Tucker & Marsh, 214 East Clay Street, Richmond, Virginia 23220, and to Gerald G. Poindexter, Poindexter and Poindexter, 304 West Cary Street, Richmond, Virginia 23220, counsel for the petitioner.

GILBERT W. HAITH
Assistant Attorney General